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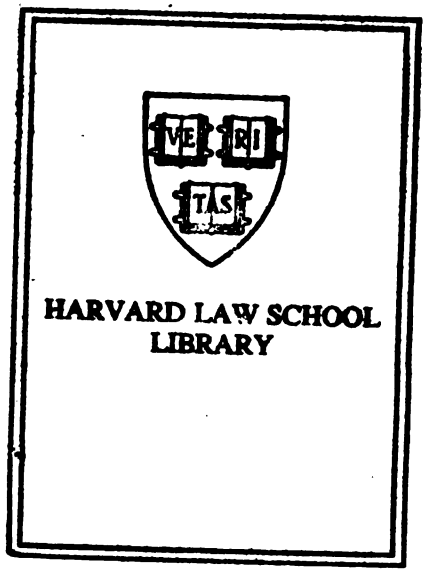

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MARYLAND REPORTS,

CONTAINING

CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

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BY NICHOLAS BREWER,
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VOL. XXIV.

CONTAINING CASES IN OCTOBER TERM, 1865, AND APRIL TERM, 1866.

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Lee May 6. 1867

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During the period comprised in this volume.

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HON. JAMES LAWRENCE BARTOL, Associate Justice.

HON. BRICE JOHN GOLDSBOROUGH, Associate Justice.

HON. SILAS MORRIS COCHRAN, Associate Justice.

HON. DANIEL WEISEL, Associate Justice.

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SECOND JUDICIAL CIRCUIT—*Anne Arundel* and *Calvert* Counties.

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THIRD JUDICIAL CIRCUIT—*Prince George's* and *Montgomery* Counties.

HON. SAMUEL H. BERRY.

FOURTH JUDICIAL CIRCUIT—*Frederick* County.

HON. MADISON NELSON.

FIFTH JUDICIAL CIRCUIT—*Washington* County.

HON. GEORGE FRENCH.

SIXTH JUDICIAL CIRCUIT—*Allegany* County.

HON. GEORGE A. PEARRE.

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HON. JOHN C. SMITH.

EIGHTH JUDICIAL CIRCUIT—*Baltimore* County.

HON. DANIEL C. H. EMORY.

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NINTH JUDICIAL CIRCUIT—*Harford* and *Cecil* Counties.

HON. JOHN H. PRICE.

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HON. JOHN C. KING.

THE CRIMINAL COURT OF BALTIMORE CITY.

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ERRATA.

Page 202, bottom line for "*Art.* 6, *Sec.* 47," read "*Art.* 4, *Sec.* 47."
Page 310, second line of second head note. *Dele* "not."
Page 323, first head note for "1802, chapter III," read "1802, chapter 111."
Page 338, twelfth line from bottom for "1802, ch. 116," read "1802, ch. 111."
Page 544, seventh line from bottom for "1 Code 15" read "1 Code *Art.* 75, Section 63."

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MARYLAND REPORTS.

OCTOBER TERM, A. D., 1865.

EDWARD J. HENRY, ROBERT MILLS, JOHN MURRAY, OF P'ETER, AND OTHERS *vs.* HIRAM KAUFMAN.

EQUITY JURISDICTION: RECEIVER: INSOLVENT LAWS.—A receiver in equity sold property of the defendant, by order of the Court, and while the proceeds of sale were in his hands, the defendant obtained the benefit of the Insolvent Laws, and the receiver was appointed his trustee in Insolvency. On appeal by the receiver and the defendant from the order of the Court of Equity, requiring him to bring the fund into Court, HELD:

1st. That the policy of the Insolvent Laws does not debar the Court in which the fund is found at the moment of Insolvency, from taking all steps necessary to its preservation.

2nd. That the order requiring the money to be brought into Court does not conflict with the power of the Insolvent Court, but is ancillary to it. Being brought in and the amount ascertained, an order to pay over to the insolvent trustee would follow as a matter of course.

3rd. That until the amount of his liability was determined, the receiver was not *functus officio*, and his appointment by the Insolvent Court did not discharge him from responsibility to the Court of Equity for the faithful discharge of his trust as receiver.

4th. That the power of the Court of Equity in this instance, was ancillary to the jurisdiction of the Insolvent Court, and invoked for the protection of the fund which may be properly within the jurisdiction of the latter for distribution.

APPEALS. It is well settled that ordinarily no appeal will lie from an order requiring a trustee or receiver to bring money into Court. Such orders rest in the discretion of the Court; and where they determine no right, are not the subject of review on appeal.

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Henry et al. *vs.* Kaufman.

APPEAL from the Circuit Court of Baltimore City.

This is an appeal from an order of the Circuit Court of Baltimore City, passed on the 4th of September, 1860, in a cause therein pending, requiring the appellant, Barroll, to bring into Court certain funds in his hands as receiver in said cause. The receiver who was also the trustee in insolvency of the appellant, Henry, afterwards appointed by the Court of Common Pleas of Baltimore City, in proceedings pending in said Court, claimed to retain the possession of said funds as trustee aforesaid, and appealed from the order of the Circuit Court. The facts of the case are fully stated in the opinion of this Court.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH & WEISEL, J.

Thos. S. Alexander and *Benjamin C. Barroll*, for the appellants.

The question arising upon this record is, how did the application of Edward J. Henry for the benefit of the Insolvent Laws affect the pending suit?

1st. It is contended that the suit abated, and that all orders passed thereafter are illegal and void. *Hall vs. McPherson*, 3 *Bland*, 538. *Pl. in Ch. by Cooper*, 62. *Sto. Eq. Pl. See* 350, *in the notes.*

2nd. That the Court had no authority to proceed in the cause, or to pass any order affecting the rights of parties until the permanent trustee was made a party by supplemental proceedings. *Glenn vs. Clapp*, 11 *G. & J.*, 1. *Zeigler vs. King*, 9 *Md. Rep. Powles vs. Dilley*, 9 *Gill*, 229.

3rd. That the appointment of receiver, and a sale by him, did not in any respect alter the rights or interests of Edward J. Henry; that the property in question was expressly sold *as his property*, and the fund in Court was *prima facie* his fund, (subject to such liens, if any, as might be established against it.) He never consented to the sale;

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on the contrary, he resisted it, and prayed that the order appointing the receiver might be rescinded, the injunction dissolved, and for further relief.

4th. That the view set forth in the Court's opinion, that the rights of the trustee of Henry do not *the fund in question*, is respectfully denied as being manifestly contrary to law. How does that Court know that liens exist against it, and, if any, to what extent? How are the creditors of Henry to contest the validity of the mortgages, &c? It is a well settled principle that the appointment of a receiver, or a sale made by a receiver, decides nothing as between contesting parties: the fund stands in the place of the property sold. But the Court below has adjudged, *in advance of any hearing whatever*, that the man whose property it ordered to be sold has no interest in the proceeds of sale! In the list of creditors furnished by Henry, *under oath*, he does not name these mortgagees as creditors. *Potter vs. Carr*, 7 *Gill*, 319. *Ellicott vs. Warford*, 4 *Md. Rep.*, 80; *and same case, in* 3 *Md. Ch. Dec.*, 296.

5th. It is contended that the application for the benefit of the Insolvent Laws of Maryland works a statutory assignment of all property, rights and credits of the insolvent to his trustee; and that the Court authorized to receive the application and grant the insolvent discharge, is *the only Court* having jurisdiction to adjudicate upon lien or other claims against the insolvent or his estate. *See Glenn vs. Karthous*, 4 *G. & J.*, 385. *Alexander vs. Gheselin*, 5 *Gill*, 138. *Glenn, Garn. vs. Boston, &c.*, 7 *Md. Rep.*, 287. *Zeigler vs. King*, 9 *Md. Rep.*, 336. *State vs. Williams*, 3 *Md. Rep.*, 163. *Glasgow vs. Sands*, 3 *G. & J.*, 96. *Segar vs. The State*, 6 *H. & J.*, 162. *Powles vs. Dilley*, 9 *Gill*, 240. *Waters vs. Dashiell*, 1 *Md. Rep.*, 471. *Glenn vs. Gill*, 2 *Md. Rep.*, 1. *Purviance vs. Glenn's Exe'rs*, 8 *Md. Rep.*, 206. Act of 1854, ch. 193, sec. 2.

6th. If it be said that bringing the fund into Court de-

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cides nothing, the answer is, *that the Court had no jurisdiction over the fund*, because the fund was in the hands of the *permanent trustee*, by virtue of the force of the Insolvent Laws. A receiver having a fund, may pay it over to a party rightfully entitled to receive it, without any order of the Court. He might obtain an order for his own protection, but it would be only a matter of prudence, and not a matter of legal obligation. In the case at bar, the receiver and permanent trustee are the same person; and if he is entitled to the fund as trustee under the insolvent application, for the benefit of the creditors, the law considers it as in his hands in the capacity in which he is entitled to hold it. If he is entitled to it as trustee, he is not bound to take it into Court with one hand and take it again with the other. *Segar vs. The State*, 6 *H. & J.*, 164. *State vs. Jordan*, 3 *H. & McH.*, 179. *Conner vs. Ogle*, 4 *Md. Ch. Dec.*, 448. *Watkins' Adm'rs vs State*, 2 *G. & J.*, 220.

But the fund has been attached in his hands under the Act of 1854, ch. 193, and legal responsibility had been laid upon the trustee, which the Court below wholly ignored. What the extent of that responsibility may be is yet to be determined. Is a party (receiver or not) bound to part with a fund during a pending attachment? Had the receiver in this case undertaken to deal with the attachment, and been unsuccessful, he would have laid himself open to the suspicion at least of collusion, as he makes no secret of the fact that he is contesting this case with the view of benefitting his client, Kaufman.

7th. Kaufman, and not the contesting mortgagees, is equitably entitled to this fund. Kaufman was the owner of the property sold under these proceedings, and sold it to Henry to be secured by mortgage, which was duly prepared, and as Kaufman supposed, executed and recorded. When the first mortgage note became due, Kaufman dis-

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covered that Henry had not executed the mortgage, and he thereupon demanded its execution in accordance with the agreement of purchase. Henry refused, and proceeded to give the various mortgages in this case, for the purpose of defrauding Kaufman. And Kaufman alleges (under oath) that all these mortgagees had knowledge of his prior lien, and took their mortgages in fraud of his rights, at a time when Henry was utterly insolvent. If these allegations are sustained by evidence, the equities are clearly with Kaufman, and he is entitled to the benefit of them.

8th. Edw'd J. Henry has appealed from the Court's order. How does he stand on the record? A bill was filed, a receiver appointed, *and his property sold against his consent.* While the fund is in the hands of the receiver, he applied for the benefit of the Insolvent Laws. Which Court shall adjudicate and distribute the fund? The Court of Common Pleas *alone* (in Baltimore city) has jurisdiction over the estates of insolvent debtors, and is *alone* entitled to make distribution thereof. *Purviance vs. Glenn's Exe'rs*, 8 *Md. Reps.*, 206. Is not the permanent trustee entitled to the fund, just as he would be to the property if it remained *in specie?* If the Chancery Court can take it out of his possession, the statutory assignment is *pro tanto* defeated. If it is the intention of the Chancery Court to order it, when in Court, to be paid back to the *permanent trustee*, then the order is vain and useless. If such is not the intention, (and it is not in this case,) then the object is to deprive the permanent trustee of his legal rights, and to defeat the policy of the Insolvent Laws. If the Court had jurisdiction over the fund or property belonging to an insolvent debtor, it could order its officer (the receiver) in relation to it; but the proposition contended for, is, that the fund being beyond the Court's jurisdiction, it cannot rightfully order the receiver to bring it into Court, or do any thing else with it. Technically, it is not in the

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custody of the receiver, and he is discharged from responsibility as such, by showing that he has paid it over to the permanent trustee, who is legally entitled to the custody of it, subject to the orders and control of the Court which appointed him permanent trustee.

It is clear that a party cannot be deprived of the right of appeal by the mere form of the order. The Act of 1830, ch. 185, prohibiting appeals from orders for the payment of money, was repealed by the Act of 1841, ch. 11, expressly granting an appeal from such orders. The order in this case, however, is in effect a *final decree.* This is exactly the case of *McKim vs. Thompson*, 6 *H. & J.*, 302. See also, *Hatton vs. Weems*, 10 *G. & J.*, 377. *Lee vs. Pindle*, 11 *G. & J.*, 362. *Glenn vs. Gill*, 2 *Md. Rep.*, 1. *White vs. Malcolm*, 15 *Md. Rep.*, 540.

If the fund is once (improperly) paid over and leaves the custody of the appellant, no final decree, which could be passed in the cause, could redress the grievance; and even a reversal of the illegal order after final decree, would be vain and useless to the appellant, because, as soon as he pays over, he becomes as receiver, "*functus officio*," and not being a party to the cause, he could not appeal from the final decree. As against him, therefore, this decretal order operates, and is a final decree.

Furthermore, as against the authority of the Court to pass this order, the appellant takes the ground that the suit had "abated," or at all events, stood in such a condition for want of proper parties, that no order or decree, interlocutory or final, could be passed in it. And the Court had no power to compel the proper party to become a party to the cause. See *Ringgold's case*, 1 *Bland*, 12, 13. 1 *Sto. Eq. Pl. Glenn vs. Clapp*, 11 *G. & J.*, 1.

This order decides that the receiver still held the fund, a fact which he expressly denied, and that the fund did not pass to the trustee in insolvency. If the order stands,

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and had been obeyed, and the view of the appellant be sustained, that it did pass under the statutory assignment, then the order required and compelled him to pay out his own money—and it is not less an infringement of his personal right, because he is called receiver, and the payment is into Court. *Hall vs. McPherson*, 3 *Bland*, 528. *Glenn vs. Clapp*, 11 *G. & J.*, 1. *Pl. in Ch. by Cooper*, 62.

To show that the receiver held the fund as permanent trustee of Henry, by the statutory assignment, the Court is referred to its decision in *Ellicott vs. U. S. Ins. Co.*, 7 *Gill*, 320, wherein the Court decided, quoting from 1 *Bland*, 431, that "the holding of the receiver, is the holding of the Court for him *from whom the possession is taken.*" Again—"the effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it, and when the party entitled to the estate has been ascertained, the receiver will be considered as his receiver." See also, *Alexander vs. Gheselin*, 5 *Gill*, 179. *Duvall vs. Speed*, 1 *Md. Ch. Dec.*, 236. *Somerville vs. Brown*, 5 *Gill*, 425. *Manahan, et al., vs. Sammon, et al.*, 3 *Md. Rep.*, 470. *Zeigler vs. King*, 9 *Md. Rep.*, 335.

It is the settled law in Maryland, that the appointment of the receiver, determined no right between the parties; —it was Henry's money in the hands of the receiver, being the proceeds of his property sold;—the holding of the receiver is for Henry, subject to such liens as may be established against it.

Apply then the Court's decision in 1 *Md.* 471, which declares that the permanent trustee is to take "all the effects of the applicant which *are liable for his debts.*" And again, "He (the permanent trustee) takes all that remained in the petitioner, (the insolvent,) which the *creditors* themselves could claim *in any form of proceeding for*

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the payment of their demands. This is the design of the law—*it is the effect of the proceeding in insolvency.*" 1 *Md., Rep.*, 471. Do not the mortgagees in the case at bar appear as *creditors*, and in no other character? *Same case*, 472. "All his property passes to the trustee by operation of law." The insolvent trustee takes exclusive possession from the Sheriff, mortgagees or others having prior liens. The administration of the insolvent's assets is confined exclusively to the Courts of law, and a Court of Equity cannot interfere. *Powles vs. Dilley*, 9 *Gill*, 240. *Segar vs. State*, 6 *H. & J.*, 164. *Watkins' Administrators vs. State*, 2 *G. & J.*, 220. *Rachel Colvin's case*, 3 *Md. Ch. Dec.*, 296. *Shipley & Wife, &c.*, 4 *Md. Rep.*, 493. *Falconer vs. Regelier*, 6 *Md. Rep.*, 552. *Chesapeake Bank vs. McClellan*, 1 *Md. Ch. Dec.*, 330. *McKim vs. Thompson*, 1 *Bland*, 156.

Geo. Wm. Brown and *Wm. A. Stewart* for the appellees, argued:

1st. That the appeal of the receiver, in this case, should be dismissed; because the order, from which the appeal was taken, was one resting in the sound discretion of the Court below, and from an order of that character an appeal will not lie. *Wheeler vs. Stone*, 4 *Gill*, 38. *Ellicott vs. Warfield*, 4 *Md. Rep.*, 80. *Porter, Exc'x, vs. Timanus*, 12 *Md. Rep.*, 283. *Sanderson vs. Alcock*, 9 *G. & J.*, 164.

2nd. But if the appeal were properly taken, then the order of the Court below should be affirmed, because it was just and proper in the premises, and warranted by the proceedings in the cause. *Story's Eq. Pl., sec.* 229. *Sasscer vs. Walker's administrators*, 5 *G. & J.*, 103. *Campbell vs. Booth*, 8 *Md. Rep.*, 107. *Ellicott vs. Ellicott*, 6 *G. & J.*, 35, 40.

3rd. The trustee of a party who has applied for the benefit of the Insolvent Laws, is not entitled to a fund arising from property sold under an order of a Court of Equity,

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which, at the time of the insolvent's application, was in the hands of a receiver of said Court, awaiting distribution among the claimants of the fund according to their respective equities; but said fund will be distributed in the Court in which jurisdiction had vested; especially is this the case where it is conceded that the fund is inadequate to pay the liens upon it. *White & Elder vs. Malcolm*, 15 *Md. Rep.*, 529. *McColgan vs. Hopkins*, 17 *Md. Rep.*, 395.

As to the objection that the money in the receiver's hands had been attached by Kaufman—we reply, that where a fund is in charge of a Court of competent jurisdiction it cannot be attached. *Walter, et al., vs. McConnell*, 13 *Pet.*, 151.

Bowie, C. J., delivered the opinion of this Court.

The receiver in this case, as the agent of the Court, sold the property in dispute, before final decree, to prevent waste and loss, the proceeds being subject to the claims of the parties thereafter to be adjudged. Subsequently, the defendant, Henry, became an insolvent petitioner, and Barroll, the receiver, was appointed his permanent trustee. The order of the Court of Equity requiring him, as receiver, to bring the fund into Court, is now appealed from by him, on the ground that the case abated by the insolvency of Henry, and after the appointment of a permanent trustee, the fund passed *ipso facto* into the hands of Barroll, as trustee, and the jurisdiction of the Court of Equity ceased *eo instanti*.

In our opinion, the policy of the insolvent system does not debar the Court in which the fund is found at the moment of insolvency from taking all steps necessary to its preservation. It would make the law an instrument of fraud, if a receiver, by becoming trustee of an insolvent, could defy the authority of the Court from which he received his appointment, and refuse to account for the funds committed to him as receiver. The order requiring the

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money to be brought into Court does not conflict with the power of the Insolvent Court, but is ancillary to it. Being brought in, and the amount ascertained, an order to pay over to the insolvent trustee would follow as a matter of course. Many of the cases cited show that the insolvent trustee asserted his claim to the fund by petition in the Court of Equity, to enjoin or prohibit the action of the trustee or officer of the latter Court, to the prejudice of the former.

In the case of *Glenn vs. Gill*, the insolvent trustee filed his petition in the Court of Equity, in the cause in which the receiver was appointed, praying an order directing him to pay over and deliver to the trustee all the money and effects in his hands as receiver, which was directed to be done. The trustee did not attempt to recover the proceeds at law, or appropriate them without the order of the Court of Equity. When, in the subsequent case of *Glenn, garnishee, vs. the Boston and Sandwich Glass Company*, it was held that these funds were liable to attachment at the suit of a foreign creditor, although they had not actually come to the hands of the trustee at the time of the attachment laid; it was because the Court of Appeals had, in two previous cases, (6 *Gill*, 404, and 2 *Md. Rep.*, 1,) declared there was no ground for the appointment of a receiver, and the funds were improperly in his hands. Hence the possession of the receiver was held to be the possession of the trustee—2 *Md. Rep.*, 19. 7 *Md. Rep.*, 294, 296; such a petition not giving jurisdiction to the Court of Equity, but recognizing its authority to pass orders necessary for the transfer of the fund from one jurisdiction to another. If the Court of Equity has power to that extent, it must have the power to require the money to be brought in, otherwise their proper officer could not be discharged, or fixed in his liability.

Suppose the receiver and trustee were different persons,

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and not one and the same, as in the present case. The former, as such, would not be authorized to pay over the funds to the latter without the order of the Court by which he was appointed. If he refused, the Court of Equity only would have such summary control over him as could compel him to obey. Otherwise, the insolvent trustee must proceed by action at law on the receiver's bond, the breach of which could not be alleged without a previous order of the Court of Equity to pay over, and his refusal.

This fund was in the custody of the Court of Equity, by which the receiver was appointed; its aggregate was undetermined. The order appealed from reserves the question of the liability of the receiver for interest, which had or might have accrued on the funds in his hands. Until this liability was determined the receiver was not *functus officio*, and his appointment by the Insolvent Court did not release him from responsibility to the Court of Equity for the faithful discharge of his trust as receiver. We think, therefore, without disturbing any of the preceding decisions of this Court, that the power of the Court of Equity in this instance is ancillary to the jurisdiction of the Insolvent Court, and invoked for the protection of the fund which may be properly within the jurisdiction of the latter, for distribution.

The conclusion arrived at above, makes it unnecessary to dispose of the motion to dismiss the appeal. It is well settled that ordinarily no appeal will lie from an order requiring a trustee or receiver to bring money into Court; such orders rest in the discretion of the Court, and where they determine no right are not the subject of review on appeal. *Wheeler vs. Stone*, 4 *Gill*, 38. *Ellicott vs. Warford*, 4 *Md. Rep.*, 80. And without recognizing the right of appeal in such cases, we will affirm the order below and remand the cause, for such further proceedings as the case may require.

Order affirmed and cause remanded.

(Decided February 14th, 1866.)

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THE MERCHANTS' BANK, OF BALTIMORE, VS. THE BANK OF COMMERCE, IN NEW YORK, USE OF HOFFMAN & COMPANY, OF NEW YORK.

PAYMENT BY MISTAKE: NEGLIGENCE: BILLS OF EXCHANGE AND PROMISSORY NOTES.—H. & Co., of New York, drew a draft on L. & Co., of Baltimore, and sold it to a bank in New York, which sent it to its correspondent, a bank in Baltimore, for collection. By the negligence of the bank in Baltimore, the draft was not collected, and L. & Co., having failed in business, it was protested and returned to the bank in New York, which notified the fact of the dishonor to H. & Co., who, in ignorance of the fact of negligence, paid the amount of the draft. On a suit brought by the bank in New York for the use of H. & Co., against the bank in Baltimore, HELD:

1st. That the payment by H. & Co. being made in mistake, conferred no benefit on the plaintiff, and could not operate for the advantage of the defendant, in the way of discharging or suspending its anterior liability to the plaintiff.

2nd. That as the amount of the draft was paid by H. & Co. under a mistake that entitled them to a return of the money, the plaintiff must be regarded as having received it for their use, and as holding it subject to their order. In legal contemplation the payment was a deposit, for which the plaintiff must account, and which, instead of suspending or discharging the defendant from its existing liability to the plaintiff, charges the plaintiff with one of an entirely different character to H. & Co.

3rd. Nor was it essential to the plaintiff's right to recover, that the jury should find that the draft was returned to the defendant. The claim asserted here is not upon the draft, but one sounding in damages for the loss caused by the defendant's negligence and consequent failure to collect it.

NEGLIGENCE: EVIDENCE: PROVINCE OF COURT AND JURY.—In cases where the question of negligence is involved, a Court may, by proper legal inferences from the nature of the undertaking, determine in general the things required to be done in performing it, and the failure to do any of the things so required to be done would amount to negligence; but it has no such power when the question as to due diligence is made to depend on a state of facts and circumstances of a character so unusual that they could not have been contemplated by the parties to the undertaking, and to which no settled rule of law can be applied.

CONSTRUCTION OF THE WORDS "DOUBTFUL CREDIT": TRIAL OF FACTS.—The words "*Doubtful Credit*" are very comprehensive, and when used without words of limitation or qualification, are understood to mean reputation or standing in the community, as distinguished from the estimate of particular individuals; and in that sense the doubtful credit of a party, when found, is a fact of which persons presumptively have knowledge, without other proof of knowledge.

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Merchants' Bank of Baltimore *vs.* Bank of Commerce use of Hoffman.

APPEAL from the Superior Court of Baltimore City.

This is an action, instituted by the appellee against the appellant, to recover damages resulting from the neglect to use due and proper diligence to collect a draft for $3,000, drawn by Hoffman & Co., on Josiah Lee & Co., bearing date the 29th of October, 1860, which the appellant had undertaken to collect for the appellee. Errors in pleading on both sides were waived, and it was agreed that the plaintiff or defendant might respectively rely on any claim or defence to which the facts of the case might entitle them.

Exception.—At the trial of the cause, it was admitted in writing that Hoffman & Co. sold to the appellee, their *sight draft* on Lee & Co , being the one described in the declaration, and that the appellee remitted it for collection to the appellant, its correspondent in Baltimore; that on the 30th of October, the runner of the appellant presented the draft to Lee & Co., about one o'clock, P. M., and a check on the Mechanics' Bank, for the amount, was given by Lee & Co. to the runner, who thereupon delivered to them the draft; that although the Mechanics' Bank was in the same square with the Banking House of Josiah Lee & Co., the runner, instead of taking the check to the Mechanics' Bank to have it cashed or endorsed "good," returned with it to the Merchants' Bank; after the draft was presented to Lee & Co., as aforesaid, and on the same day, they stopped payment; that after the check was received by the runner, and taken to his bank, the president of the appellant, hearing that Lee & Co. were about to fail, and that the appellant held their said check, directed their runner to present it to the Mechanics' Bank for payment, which was immediately done, and payment refused, whereupon application was made by the runner to Lee & Co., but they also refused, but subsequently returned the draft, and received back their check; that the draft was thereupon protested and returned to the appellee, who demanded and

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received payment of it from Messrs. Hoffman & Co., neither the appellee nor Hoffman & Co. knowing anything of the above-mentioned facts, except that the draft had come back protested; that Hoffman & Co. were entitled to draw said draft, and Lee & Co. were bound to pay it on presentation; that on learning the facts, Hoffman & Co. wrote to the appellee, asking permission to institute the present action in its name, for the purpose of testing the liability of the appellant, enclosing a letter from their counsel, in which it was suggested that they might not be able to maintain a suit in their own name, because there was no privity of contract between them and the appellant; that the appellee enclosed this letter to the appellant, and asked whether the latter preferred that the liability of the latter should be tested in that way, or by a suit brought by Hoffman & Co. against the appellee in New York. The appellant, after some delay, replied that it was advised not to pay until its liability was established by our own Courts, and thereupon, the present suit was brought.

Holtzman, the appellant's witness and runner, proved, that he presented the draft to Lee & Co. shortly after one o'clock, on the 30th of October, 1860; that they gave him therefor their check on the Mechanics' Bank, and that he surrendered the draft, and after completing his rounds, took the check, without having presented it for payment or endorsement, back to his own bank; that it was entered on the books of the bank, and $3,000 passed to the credit of the appellee, and the book on which it was so entered handed over to the teller; that the check reached the teller near three o'clock, and after he had had it from ten to fifteen minutes, the teller told the witness that he had just heard from Mr. Hopkins, the president of the appellant, a rumor that the house might fail, and directed the witness to present it to the Mechanics' Bank.

The witness, *Holtzman*, took the check to the Mechanics'

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Bank, where he arrived with it about three o'clock. The teller held the check in his hand for some time, to see if it would be made good by a deposit, and while doing so, was directed by the cashier not to pay it. Holtzman then applied to Lee & Co., who said they had no money to pay it, and refused at first to return the draft—their confidential clerk saying it had been cancelled and charged up: they were eventually persuaded by the assistant cashier of the appellant to surrender it, and it was protested.

Rogers, the teller of the Mechanics' Bank, and *Coleman*, the cashier, both prove that the check would have been paid or endorsed "good," at the pleasure of the holder, at any time before two o'clock, and as late as nearly three of that day, and *Coleman* proved that four checks *drawn after the one in question*, amounting to $13,284.75, were, in fact, either paid or endorsed "good;" that this was the first of which payment was refused, and that said bank paid or endorsed "good" that day the checks of J. Lee & Co., to the amount of $130,000.

Coleman, also proved on cross-examination, that, on the morning of the 30th of October, 1860, the money market being stringent—people everywhere losing confidence in each other, and Josiah Lee & Co. having over-checked, and the bank holding then some $26,000 of their unredeemed checks, which, under the custom of the bank, as between it and those who had deposited such checks, he had a right to return before 11 o'clock, he became uneasy, and went down to their banking house to notify them that unless they made good their account by a deposit, he would return said checks; that their confidential clerk begged him not to do so, and said that "they had money in the house, and could make a deposit in a few minutes; that one of the firm had just gone out with Messrs. Johns Hopkins, (the president of the appellant,) and John Garrett, and that he thought they would get money;" the

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fears of the witness were then allayed; that the promised deposits, and some six or seven others being made during the day, amounting to $57,214$\frac{80}{100}$, the bank continued to pay their checks till near three o'clock; that he then became apprehensive, because the checks came in faster than in the morning, and the deposits were not so large as they should have been, and *there seemed to be an uneasiness felt about the house in the community*, and when the check held by the appellant was presented, he told the teller not to pay it. The witness also proved on cross-examination, that Lee & Co. were in fair credit up to the time of their failure; that some time before, having occasion to make inquiries as to their standing, he ascertained them to be in fair credit and standing, and that they were considered an exceedingly honorable house; that they did probably as large a business in their line as any house in town; that their transactions were of such magnitude as to excite the surprise of the bank, as they sometimes made deposits to the amount of $200,000 in one day; and that their failure excited great surprise, not only in the community, but all over the country; that they had some considerable credit with his bank on the 30th Oct., as is shown by the transactions between them; and when they failed they were in debt to the bank in the sum of $48,140, for which the bank held collaterals; and that the witness would not consider a runner indiscreet who on that day would have taken their unendorsed check for $5,000.

The same witness also proved that he has been a bank runner and is familiar with the practice of banks with reference to sight drafts, and that his practice is always to take a check, and, unless the honor of the house is doubted, to give up the draft, but if there is any doubt about the check, to get it endorsed; that if convenient, or there is any doubt about the check, then the check is presented at once for endorsement; that if a merchant takes time to consider

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whether or not he will pay a draft drawn, the practice is to give him till three o'clock, or after, before protesting; and if a check were taken for a sight draft brought into the bank, and afterwards presented and dishonored, it appeared to witness (although this was the first case of the kind that he remembered,) that the natural and proper course would certainly be to return the check and get back the draft for protest.

The plaintiff then further proved by *Mr. Krebs*, that he is specie clerk to the clearing house, and now acting as runner of the Union Bank, during the sickness of the regular runner; that the practice among banks is to present a sight draft to the drawer, and upon receiving a check for it, to go at once to the bank on which it is drawn and have it endorsed; that he always had Lee & Co.'s check endorsed at once,—that they were not tip-top; that he did not himself know their condition on the 30th October, 1860, but considered them weak, and heard talk in the community about their weakness about that time; and that under such circumstances, he would undoubtedly have considered it his duty, under the usage between banks in this city and their correspondents abroad, to present a check received in payment of a draft to be certified as good, at once, before returning to his bank.

On cross-examination the same witness stated that he followed, without regard to the usage the special instructions of his bank, and they were of such a character that if he had a check of any good merchant of undoubted standing, he could return to the bank before presenting it; that if he had some doubt about a check even, witness would take his rounds, and it was within his power as runner to arrange when he would present it consistently with his duties and convenience during business hours.

The plaintiff then further proved by *James W. Allnutt*, the president of the Bank of Commerce, (of Baltimore) that

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the usage among banks in Baltimore as between them and their correspondents is, and was, on the 30th Oct., 1860, to present a sight draft as early in the day as business will permit, and if a check be given in exchange to have it immediately certified before taking it back to the bank, and if this be not done the check is under the usage a payment of the draft; that his instruction to his runner is always to have a check taken for a draft at once endorsed, before returning to his bank; that the runner has no discretion, and if he brings in an unendorsed check the responsibility is with the teller and the bank, and as between the latter and its correspondent the draft is considered paid; that the house of Lee & Co. was in bad credit on the 30th October, 1860, his impression for some weeks before their failure having been that they were in bad credit, and under that impression he gave positive instructions to his teller not to receive their unendorsed checks; and that from his knowledge of their credit on the 30th October, 1860, and of their credit in the community at that time, he would not have thought it reasonably prudent to have taken their unredeemed check.

On cross-examination the same witness stated that the first business of the runner in the morning is at the clearing house, from which he returns about nine o'clock, when he enters up the drafts for presentation for payment and acceptance, whether on merchants, brokers, or banks, and gets out on his rounds by about ten or eleven o'clock; that it takes him of course some time, depending on the amount of paper and the route he takes to present his paper; that the instruction witness gave his teller was verbal and some days before the failure of Lee & Co.; that his general instruction to his runner not to take unendorsed checks, did not make his rule inflexible and he would himself take the responsibility of retaining the check of a good house if it were brought in by the runner; that the teller at the counter takes checks of good parties on deposit unendorsed be-

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cause they could be returned up to eleven o'clock the next day; but if a check is taken for a bill of exchange or promissory note held by the bank for collection, witness thought the responsibility and risk of the collecting bank was definite at once on such exchange, and the loss would fall upon the collecting bank.

In reply to a question of the plaintiff's counsel, he further stated that in all he had said about the responsibility of collecting banks and their duty and that of their runners, witness expressed not only his individual opinion, but the result of established usage between banks in the city and their correspondents.

The plaintiff then proved by *Patrick Gibson*, cashier of the Bank of Baltimore, that he did not think Lee & Co. had much credit on the 30th October, 1860, and that their credit on that day was neither very good nor very bad, but sufficiently doubtful to prevent loans to them without security, or their checks being taken without endorsement; that considering their standing, it was the duty of a bank having a sight draft on them to have had the check received therefor immediately endorsed; and that the usage of banks in this city, as between them and their correspondents abroad, so required.

On cross-examination the same witness stated that the teller had instructions with respect to taking checks of that, and other houses, to get them endorsed; that in case a check were taken for a sight draft and presented immediately, and dishonored, the course of the bank would be to get back the draft for protest, and he would not consider a bank bound having used due diligence; that the runner is bound to take the nearest road to the bank, on which the check is drawn, before his return to his own bank, and if when he received the check it was good, and in consequence of going his rounds, it was not paid, it is not due diligence; that it is the universal practice to take checks for drafts,

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and if a check is brought in unendorsed and is sent back by the teller during business hours, the bank would not be bound if the check is dishonored, unless it would have been paid if presented before; that checks and sight drafts must be presented before three o'clock, and may be at any time before that, if the check of any house however good; that even if of the house of Alexander Brown & Sons, had been taken for a sight draft brought in unendorsed, and the teller had sent it in between two and three o'clock, and in the meantime that house had by some miracle failed, the loss would fall upon the bank.

The plaintiff then proved by *Mr. Mickle*, cashier of the Union Bank, that the credit of Lee & Co. was not very good on the 30th October, 1860; that it was not so undoubted as it had been, and he had given special instructions for some time previous to their failure not to receive their unendorsed check for any purpose; that it was the duty of a bank having a sight draft on them for collection under the usage of banks in Baltimore, as between them and their correspondents to have had their check endorsed before returning to bank.

On cross-examination he further stated, that the practice is for the runner always to take checks and give up the draft, but to get the checks endorsed, unless they were of small amount, or those of houses in undoubted credit, where checks usually were taken.

The defendant then proved by *Mr. Martin*, the runner of the Mechanics' Bank, that the uniform practice among banks holding sight drafts for collection is to present them at any time before three o'clock, and to surrender the draft before receiving a check; that if of a doubtful house the check is presented before returning to bank, (and the house of Lee & Co. was such a house on the 30th October, 1860,) but checks of such houses as Johnston & Bros., McKim & Co., Carson & Co., the practice does not require to

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be endorsed, but they often go into the lists of the next day; that he would take a check of a doubtful party to have it endorsed in the course of his rounds, but if he had brought it into the bank and afterwards gone out with it for endorsement, and it had been dishonored, he thought the duty of the bank would be to get back the draft, and protest, and if done before three o'clock all its duty would have been performed.

On cross-examination he stated, that he believed, on 30th October, 1860, that Lee & Co. were bad, and consequently would have had their check endorsed, but if presented before three o'clock, his duty would have been performed.

The defendant then proved by *Mr. James*, the runner of the Bank of Baltimore, that it is the practice to take checks for sight drafts, and if of doubtful persons or of very large amount, to have them endorsed good before taking them back to bank, but if the party is supposed to be good, the check is brought in without endorsement; and that if the teller sent him back with a check for endorsement, and it was dishonored, the duty of the bank would be to get back the draft and protest it.

The defendant then proved by *D. A. Jones*, the third teller of the defendant, that the general practice with reference to sight drafts, is to take all drafts out together in the morning, and arranging the runner's route according to the number and situation of the parties to present them in time; that upon receiving checks the universal practice is to give up the draft, and if of a doubtful house, and the bank on which it is drawn is within the route, to get it endorsed, but if not within these rounds to bring it back to the bank, when if objected to, the teller sends out to have it endorsed; that the witness has himself had when runner, eighty-one drafts at one time to present, and it would be impossible to get every check endorsed; that he had no reason to doubt the credit of Lee & Co. on the 30th October, he knew they

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were in stocks, but not enough to affect their credit; that if a check received for a sight draft, were presented before three o'clock and dishonored, and the draft procured again and protested, the collecting bank under the usage would have performed its duty; that witness would have delayed in such case by performing other work about the bank, and if he presented the check before three o'clock, would have thought it sufficient.

On cross-examination the same witness stated that he had as much opportunity as any person or officer of the bank to know about the solvency of houses; that the practice does not require presentation of a check, where of a doubtful house, if out of runner's route, before returning to bank. Witness would have taken a check of Lee & Co. drawn on the Mechanics' Bank, back to his own bank if he had thought them good.

The defendant then proved by *Mr. Rogers*, paying teller of the Mechanics' Bank, that this check was presented late in the day, but during banking hours to the best of his knowledge; that he made no objection about the time, but asked the runner to wait a few minutes for a deposit; that if the check had been good it would have been endorsed, and was in time for that purpose, if Lee & Co. had funds there; that he was acquainted with the usage in relation to sight drafts; that it is customary to receive checks, not to demand cash and to give up the draft, sometimes these are endorsed, sometimes not, according to the standing of the house, and if of a responsible house, they are sent in the next day; that Lee & Co. were considered a responsible house up to the time of their failure. On cross-examination he also stated, that if this check had been presented before two o'clock, it would have been paid.

The defendant then proved by *Mr. James Mott*, cashier of the Farmers' & Mechanics' Bank, that the practice in relation to sight drafts, is to give them up on receiving a

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check, unless the honesty of the party is doubted, and if the person has confidence in the party paying the check, he does not get it endorsed; that a draft may be left with the party bound to pay it, if requested, the whole day; and if the check is retained, it is at the risk of the collecting bank, if the money would have been paid on it, and it is lost by not being presented promptly; that the loss would be our loss, not that of our correspondent.

The defendant then proved by *Mr. Compton*, that he is in the Merchants' Bank, and was formerly runner for a year and a half; that the universal practice is to take checks for drafts if the parties are known at all, sometimes endorsed, sometimes not, according to the standing of the house, and to take checks of banking houses for almost any amount; that it is the teller's business to object to them if doubtful, and send them out for endorsement; that the average number of checks for drafts, when he was runner, was from sixty-five to seventy, and it took him all day to present these drafts; that the checks of Lee & Co. were taken without endorsement, and sent in the list of next day, and he was very much surprised, when they failed.

On cross-examination, he stated that he spoke of the practice between himself and the teller of his bank, and also thought the usage general among banks and bank runners; that he had nothing to do with the responsibility of the bank to its correspondents; if parties requested it the draft might be left till three o'clock for consideration.

The defendant then proved by *Chauncy Brooks*, President of the Western Bank, that the usage in reference to drafts, is to take checks for them, the runner bringing them to the teller, and if good, they are put into the list for next day; if the teller thinks them suspicious, he sends them out again for endorsement; that his bank sent in a check of Lee & Co. for $5,000, of 30th Oct. on the next day,

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which was returned unpaid; that he always supposed that Lee & Co. were good; that they would have had credit with his bank unendorsed for $5,000 on that day; that a check for that amount would have been taken for a sight draft, without any collaterals; that he takes no better checks every day, and their failure surprised him and everybody else.

On cross-examination, he stated that the check he spoke of was taken on deposit; that the bank let them have money, and they deposited their check to make the account good; that the bank had collaterals, but don't know whether they were applicable to that check; that Lee & Co. would have had credit with his bank through the arrangement made between them, but independent of collaterals, the bank would have taken such a check as cash on deposit, relying on their credit, and that he never suspected their credit.

The testimony being closed, the plaintiff presented the following prayers to the Court:

Plaintiff's first Prayer.—The plaintiff by its counsel, prays the Court to instruct the jury, that if they believe the facts stated in the agreed statement, and also from the evidence in the cause, that the plaintiff transmitted to the defendent as its correspondent in Baltimore, for collection, the bill of exchange for $3,000, dated the 29th of October, 1860, which has been offered in evidence, and that the defendant as such correspondent, received and undertook and assumed to collect the same on the morning of the 30th of October, 1860, and placed it in the hands of the witness Holtzman for that purpose, and that said Holtzman was an officer or agent of the defendant, and that said Holtzman presented said bill of exchange, to the said Josiah Lee & Co., about one o'clock in the afternoon of the 30th of Oct., 1860, and that the said Josiah Lee & Co., on whom the same purports to have been drawn were then in doubtful

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credit, and that the said Holtzman then received from the said Josiah Lee & Co., for said bill of exchange and other claims, also in the hands of the defendant, the check on the Mechanics' Bank for $5,070.78, which has been offered in evidence, and gave up said bill of exchange to Josiah Lee & Co., and that the latter marked said bill as cancelled, and that the said Mechanics' Bank was at that time within the same square with the banking house of the said Josiah Lee & Co., and that the banking house of the defendant is several squares off from the latter, and that the said check would have been paid by the Mechanics' Bank if it had been presented at any time between one and two o'clock in the said afternoon of the 30th October, 1860, and that said check was taken by the said Holtzman to the defendant, and the amount thereof placed by it to the credit of the plaintiff, and that the payment of said check was not demanded until a few minutes before or after three o'clock in the afternoon of the 30th of October, 1860, then the plaintiff is entitled to recover in this action.

Plaintiff's second Prayer.—The plaintiff by its counsel, prays the Court to instruct the Jury, that if they believe the facts stated in the agreed statement, and also from the evidence in the cause, that the plaintiff transmitted to the defendant as its correspondent in Baltimore, for collection, the bill of exchange for $3,000, dated the 29th of October, 1860, which has been offered in evidence, and that the defendant as such correspondent, received and undertook and assumed to collect the same on the morning of the 30th of October, 1860, and placed it in the hands of the witness Holtzman, for that purpose, and that said Holtzman was an officer or agent of the defendant, and that the said Holtzman presented said bill of exchange, to the said Josiah Lee & Co., about one o'clock in the afternoon of the 30th of October, 1860, and that the said Josiah Lee & Co. on whom the same purports to have been drawn, were

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then in doubtful credit, and that said Holtzman then received from the said Josiah Lee & Co., for said bill of exchange and other claims, also in the hands of the defendant, the check on the Mechanics' Bank for $5,070.78, which has been offered in evidence, and gave up said bill of exchange to said Josiah Lee & Co., and that the latter marked said bill as cancelled, and that the said Mechanics' Bank was at that time within the same square with the banking house of the said Josiah Lee & Co., and that the banking house of the defendant is several squares off from the latter, and that said check would have been paid by the Mechanics' Bank, if it had been presented at any time between one and two o'clock in the said afternoon of the 30th of October, 1860, and that said check was taken by the said Holtzman to the defendant, and the amount thereof placed by it to the credit of the plaintiff, and that the payment of said check was not demanded until a few minutes before or after three o'clock in the afternoon of the 30th of October, 1860, and that on the said 29th and 30th of October, 1860, there was a uniform usage and custom among the banks of the city of Baltimore, as between such banks and their correspondents abroad, remitting to them drafts for collection, which would make such circumstances, if found to exist as hereinbefore hypothetically stated, amount to a payment of said draft as between the plaintiff and defendant, that then the plaintiff is entitled to recover in this action.

And the defendant presented to the Court the following prayers:

Defendant's first Prayer.—The defendant prays the Court to instruct the jury, that if they find the facts contained in the statement of facts, signed by the counsel, and shall further find that it is the established practice with the banks of the city of Baltimore, and was on the 30th of October, 1860, to receive checks from drawers of sight drafts, and

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to leave the drafts on the receipt of such checks, then the plaintiff is not entitled to recover in this case.

Defendant's second Prayer.—That if the jury find the facts required to be found in the preceding prayer, and further find that up to two o'clock of the day of the failure of Lee & Co., said firm was in such credit with the defendant and its officers, and prudent and careful officers of other banks in the city of Baltimore, that their checks were and had been taken without endorsement, as cash on deposit, and in exchange for sight drafts, and shall further find that the check of said Lee & Co., taken by the runner Holtzman in exchange for the sight draft of Messrs. Hoffman & Co., given in evidence, was presented to the teller of the Mechanics' Bank during the business hours of the 30th of October, 1860, and that when so presented, it was not at once refused payment, but that the runner was told to wait a few minutes, until the teller could ascertain whether the check would be made good by a deposit, and shall further find that previously on said 30th of October, the Mechanics' Bank had paid or endorsed checks of said Lee & Co., to the amount of upwards of $120,000, then the plaintiff is not entitled to recover.

Defendant's third Prayer.—The defendant prays the Court to instruct the jury that if they find the facts set forth in the admissions signed by the counsel of the plaintiff and defendant, that then the defendant was the agent of the plaintiff and not of Messrs. Hoffman & Co., to collect the draft of Messrs. Hoffman & Co., offered in evidence, and is responsible to the plaintiff alone, for due diligence in regard to the collection thereof.

Defendant's fourth Prayer.—The defendant further prays the Court to instruct the jury, that the plaintiff cannot charge the defendant for a want of due diligence in reference to the collection of the draft mentioned in the preceding prayer, without showing that the plaintiff has suffered

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loss from want of such diligence, and if the jury find that on the return to New York of said draft duly protested, the amount thereof was promptly and fully paid by the drawers to the plaintiff, and has never been repaid by the plaintiff to the drawers, and that the plaintiff has never set up any claim against the defendant on its own account, but has presented the claim now sued on, as that of Messrs. Hoffman & Company, as shown by the correspondence given in evidence, and that the plaintiff has never returned said draft of Messrs. Hoffman & Company, to defendant, then the plaintiff is not entitled to recover.

Defendant's fifth Prayer.—That if the jury find the facts required to be found in the preceding prayers of the defendant, but shall also find any want of due diligence by the defendant in reference to the collection of said draft, the plaintiff cannot recover more than nominal damages.

Defendant's sixth Prayer.—That by the entry of this suit to the use of Messrs. Hoffman & Company, the plaintiff is not entitled to enlarge his damages beyond what the plaintiff would be legally entitled to, if no such entry had been made.

Defendant's seventh Prayer.—The defendant further prays the Court to instruct the jury, that if they find the facts required to be found in the preceding prayers of the defendant, and find that the runner of the defendant, at the time he received the check from Messrs. Lee & Company mentioned in the evidence, had no reason to doubt the credit of Messrs. Lee & Company, and supposed that the said Lee & Company were of good credit, and shall further find that the failure of Messrs. Lee & Company, excited great surprise with intelligent bankers and business men in the city of Baltimore, that then the said runner was not bound to present said check to the Mechanics' Bank before returning to the banking house of the defendant; and if they shall find that as soon as practicable under all the cir-

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cumstances of the case, after the defendant ascertained the doubtful solvency of Messrs. Lee & Company, the said check of the Messrs. Lee & Company was presented to the Mechanics' Bank, and duly dishonored, the plaintiff is not entitled to recover.

But the Court below, (MARTIN, J.,) rejected all of said prayers, and gave the following instruction to the jury:

I instruct the jury that if they believe the facts stated in the agreed statement, and also from the evidence in the cause that the plaintiff transmitted to the defendant, as its correspondent in Baltimore, for collection the bill of exchange for $3000, dated the 29th of October, 1860, which has been offered in evidence, and that the defendant as such correspondent received and undertook and assumed to collect the same on the morning of the 30th of October, 1860, and placed it in the hands of the witness Holtzman for that purpose, and that said Holtzman was an officer or agent of the defendant, and that said Holtzman presented said bill of exchange to the said Josiah Lee & Company, about one o'clock in the afternoon of the 30th of October, 1860, and that the said Josiah Lee & Company, on whom the same purports to have been drawn, were then in doubtful credit, and that the said Holtzman then received from the said Josiah Lee & Company, for said bill of exchange and other claims also in the hands of the defendant, the check on the Mechanics' Bank for $5,070.78, which had been offered in evidence, and gave up said bill of exchange to Josiah Lee & Company, and that the latter marked said bills as cancelled, and that the said Mechanics' Bank was at that time within the same square with the banking house of the said Josiah Lee & Company, and that the bankiug house of the defendant is several squares off from the latter, and that the said check would have been paid by the Mechanics' Bank, if it had been presented any time between one and two o'clock in the said afternoon of the 30th of October,

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1860, and that said check was taken by the said Holtzman to the defendant, and the amount thereof placed by it to the credit of the plaintiff, and that the payment of said check was not demanded until a few minutes before or after three o'clock in the afternoon of the 30th of October, 1860, and if they shall also believe that at the time last mentioned there was a usage among the banks of the city of Baltimore, as between them and their correspondents abroad, to get checks received for sight bills of exchange, when said checks were drawn by houses or individuals of doubtful credit, paid or endorsed good before taking them back to the banks holding them for collection, then the plaintiff is entitled to recover in this action the amount of said bill of exchange; *provided* the jury find that the defendants in failing to have the said check presented for payment or to be endorsed as good by the Mechanics' Bank before three o'clock on the 30th of October, 1860, were guilty of a want of due care, skill and diligence in their employment as collectors of the said bill of exchange; and that they also find that the said check if it had been presented for payment between the hours of one and two o'clock on that day, would have been paid by the Mechanics' Bank, and the said draft collected. To the rejection of which said prayers offered by the defendant, and each of them, and to the granting of said instruction as given, the defendant excepted, and the verdict of the jury and judgment being for the plaintiff, appealed.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

F. W. Brune and *C. J. M. Gwynn* for the appellant.

A check upon a bank, given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds, sufficient to meet

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the check, in the bank on which it is drawn. It is looked upon as the means by which the holder may procure the money. *Cromwell vs. Williams & Lovett*, 1 *Hall*, 56. *Olcott vs. Rathbone*, 5 *Wend.*, 491. *Everett vs. Collins*, 2 *Camp.*, 515. *Russell vs. Hankey*, 6 *T. R.*, 13. To constitute such a check a payment, there must be evidence in the Record that it was *expressly* received in substitution for, and in satisfaction of, the bill in reference to which it was given. *Clopper's Admr. vs. Union Bank*, 7 *H. & J.*, 100. *Glenn vs. Smith*, 2 *G. & J.*, 509. *Crawford vs. Berry*, 6 *G. & J.*, 71 and 72. And the law upon which we have insisted is yet more expressly decided in the case of the *Md. and N. Y. Coal and Iron Co. vs. Wingert*, 8 *Gill*, 177.

It would be absurd to suppose that the law would imply that a check, which is, while unpaid or unaccepted, only the *evidence* of the indebtedness of its drawer, was accepted as a payment of a bill, which was itself not only an evidence of the indebtedness of the drawer of the check, but also of the indebtedness of another party. See *Russell vs. Hankey*, 6 *T. R.*, 13.

If a bill is surrendered and a check taken for the amount, the want of power to recover against the endorsers is the result of the fact that the original holder of the bill is no longer able to produce it at the trial of any suit brought against such endorsers.

In this case it appears that Josiah Lee & Co. marked the bill of Hoffman & Co., left with them by the runner of the Merchants' Bank, as *cancelled*. No circumstance, except the payment of a bill, or some fact equivalent to its payment, authorizes such cancellation. If it is cancelled, when such facts and circumstances do not actually exist, the cancellation has taken place by the act of the party responsible upon the bill, without the assent of the rightful holder, and the act of cancellation is a simple nullity.

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2 *Parsons on Bills*, 164 and 564. *Raper vs. Birkbeck*, 15 *East.*, 17. *Olcott vs. Rathbone*, 5 *Wend.*, 490. *Pratt vs. Foote*, 12 *Barb.*, 209.

A bank check is itself an inland bill of exchange payable on demand, and the general law is that if such an instrument is given to a party in the morning of any day, the holder makes the presentation of it in time, if he makes it at the bank, on which it is drawn, on the following morning. *Appleton vs. Sweetapple*, 3 *Doug.*, 137. 26 *Eng. C. L. Rep.*, 59. *Williams vs. Smith*, 2 *Barn. & Ald.*, 496. *Robson vs. Bennett*, 2 *Taunt.*, 388. *Chitty on Bills, Am. Ed.* 1842, 382 and 386. 2 *Parsons on Bills*, 72 and 73, and notes. *Byles on Bills*, 14.

Therefore, under the general "law merchant," the appellant in this case, *if authorized to receive a check at all for the bill*, had until the next day to present such check for payment. And, unless the Record clearly shows the existence among the banks in Baltimore of a usage to the contrary, the Merchants' Bank would have been authorized in retaining the check of Josiah Lee & Co. until the morning of the next banking day after the 30th of October, 1860. 2 *Parsons on Bills*, 72. *Moule vs. Brown*, 4 *Bing. N. C.*, 266, (33 *Eng. C. L. Rep.*, 348.) *Bayley on Bills, Eng. Ed.* 1830, 242. *Chitty on Bills*, 382. *O'Brien vs. Smith*, 1 *Black*, 99.

It was not material whether Holtzman, the runner, arrived at the Mechanics' Bank on the 30th of October, 1860, a little before, or a little after three o'clock, when he presented to that bank the check of Josiah Lee & Co. for payment. Nor is it material whether the outer door of the bank was closed or not when the runner arrived to make presentment of the check. For the Record shows that the teller of the Mechanics' Bank and its cashier were in the bank at the time, able to return an answer, and that they did return an answer by refusing to pay the check. The pre-

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sentment for payment was therefore sufficiently made on that day. *Garnett vs. Woodcock*, 1 *Stark*, 475. 6 *M. & S.*, 44. *Chitty on Bills*, 387.

Where the drawer of a check has no effects in the hands of a drawee, the giving of such a check is a fraud in itself. *Bickerdike vs. Bollman*, 1 *T. R.*, 408. *Eichelberger vs. Finley*, 7 *H. & J.*, 386, 387, 388. 2 *Parsons on Bills*, 71, note E.

It is clear, from the cases cited above, and from the case of *Eichelberger vs. Finley*, 7 *H. & J.*, especially, that if the giving of the check by Lee & Co. upon the Mechanics' Bank to the Merchants' Bank was a fraud, the transaction did not change the right of any of the parties to demand the bill of exchange, for which the fraudulent check was professedly given. No presentment of that check within a reasonable time, or at any time, was necessary, nor when demand was made and payment refused, was the drawer of the check, so circumstanced, entitled to any notice. *Eichelberger vs. Finley*, 7 *H. & J.*, 387.

The first observation to be made in regard to the Court's instruction is, that the Court below was in error in the use of the following language in the instruction: "That the defendant, as such correspondent, received, and undertook and assumed to collect the same on the morning of the 30th of October, 1860." The instruction, as thus worded, was likely to mislead the jury, because it manifestly bears the construction that there was evidence in the cause, or a legal obligation existing on the part of the Merchants' Bank, sufficient to show an assumption by the Merchants' Bank of a duty to collect the bill on the morning of the 30th of October, 1860, and that it had been placed in the hands of the runner of the bank "*for that purpose.*" As the hour at which the amount of the bill ought to have been actually collected by the Merchants' Bank, on the 30th of October, 1860, forms the material basis of the

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appellee's theory in this case, the language of the Court, so doubtfully worded as to leave the impression upon the minds of the jury that there was evidence in the cause that the Merchants' Bank had assumed to collect the bill on the *morning* of the 30th of October, 1860, and had placed it in the runner's hands *for that purpose*, is liable to grave objection.

It seems also plain that the Court below erred in permitting the jury to find the naked fact, that Josiah Lee & Co. were, about one o'clock in the afternoon of the 30th of October, 1860, "*in doubtful credit*," without, at the same time, requiring the jury to find that the Merchants' Bank knew that such a state of doubtful credit existed. It is submitted to the Court that although evidence of general reputation is admissible to prove matters of public and general interest, and that all persons concerned in such questions are liable to be affected by such evidence of general reputation, yet, that the particular credit of a particular man, or firm, is not the subject of such evidence of general reputation, so as to affect the rights of a stranger. Men are not legally bound to know the commercial standing of each other.

It is further urged that the Court below gave an instruction tending to mislead the jury, when it left to the jury as a material fact, the finding that Josiah Lee & Co. had marked the bill left with them by Holtzman as *cancelled*. The cancellation of the bill by Josiah Lee & Co. could only have been authorized upon the theory that the bill was in law, or in fact, paid by the operation of the particular circumstances which had taken place. If they were mistaken as to the payment of the bill handed to them by Holtzman, their act of cancellation was a simple nullity. *Raper vs. Birkbeck*, 15 *East.*, 17. Why then did the Court below leave the fact of the cancellation of the bill by Josiah Lee & Co. to the jury at all, without, also, requiring the

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jury to find that the act of cancellation was authorized by the Merchants' Bank? Or, why did the Court below submit the question of the *cancellation* of the bill to the jury at all? The real matter for the jury to determine, under proper instructions, was not whether Josiah Lee & Co. had *cancelled* the bill drawn upon them, but it was whether the delivery of the check to the runner of the Merchants' Bank, and the leaving of the bill with Josiah Lee & Co. operated as a payment of the bill. The cancellation of the bill by Josiah Lee & Co. could avail to prove only, that Josiah Lee & Co. *thought* they had paid it, when they gave the check in question.

The Court below also erred when it made the near proximity of the Mechanics' Bank to the banking house of Josiah Lee & Co. one of the facts from which a conclusion of negligence on the part of the Merchants' Bank might properly be drawn. For, as the evidence in the case, to which the Court itself refers, shows that the house of Josiah Lee & Co. gave the check about *one o'clock*, and that the check would have been paid if it had been presented at any time before *two o'clock*, what reason was there for calling the attention of the jury to the relative distance between the banking house of Josiah Lee & Co. and the Mechanics' Bank, and between the banking house of Josiah Lee & Co. and the Merchants' Bank. The hour of time within which the terms of the instruction *concede* the check to have been absolutely good, was sufficient for a return to the Merchants' Bank and a subsequent demand by the runner for the payment of the check at the Mechanics' Bank. This being the case it was surely no evidence of negligence that the runner of the Merchants' Bank should have gone to that bank before going to the Mechanics' Bank.

It is further urged, that the Court erred when it left to the jury to find whether the check was presented for payment to the Mechanics' Bank a few minutes before three

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o'clock, or a few minutes after three o'clock, as one element in the conduct of the Merchants' Bank, which was material to the case; because, for the reasons already given, we insist that due diligence was used in presenting the check, if the presentation took place before three o'clock; and that due diligence was equally used, if the presentment was made a few minutes after three o'clock, since both the cashier and the teller were at their posts in the Mechanics' Bank, ready to give an answer, and answering, when the check was actually presented.

It is further urged, that the Court also erred when it left the jury to find, as an additional fact, that there was on the 30th of October, 1860, "a usage among the banks of the city of Baltimore, as between them and their correspondents abroad, to get checks received for sight bills of exchange, when said checks were drawn by houses or individuals of doubtful credit, paid or endorsed good before taking them back to the banks holding them for collection."

All the evidence in this cause shows very clearly that the runner of the appellant, and the appellant itself, was authorized by the unvarying usage in Baltimore in receiving the check. Now we insist that in order to charge the appellant with any other duty as to this check than that imposed by the general rule of law to which we have referred, it was essential to the appellee to have shown an established and uniform custom among the banks in Baltimore, in relation to this particular matter of the time for presenting checks received for sight drafts. If a usage makes a part of the obligation of a party, it is only "when it is so far established, and so far known to the parties, that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established and not casual, uniform and not varying, general and not personal, and known to the parties." 2

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Parsons on Contracts, 53. *Wood vs. Wood*, 1 *C. & P.* 59. *The Paragon, Ware*, 322. *Trott vs. Wood*, 1 *Gall.* 444. *Martin vs. Delaware Insurance Co.* 2 *Wash., C. C. R.* 254. *Bank of Columbia vs. Fitzhugh*, 1 *H. & G.*, 248. *Foley & Woodside vs. Mason*, 6 *Md. Rep.*, 50.

Under these circumstances, since the evidence in this case was conflicting, and the practice of the appellant was shown to have been clearly different from the custom stated in the instruction of the Court, there was in reality no proper evidence of such a custom to be left to the jury. If a usage, as that term is known to the law, exists only when it is "the rule of all the banks of the place," is it not perfectly clear that there is no evidence, which ought to be left to the jury in relation to such usage, when the proof is, that such usage was not the rule of all the banks of the place, but that on the contrary no three banks were fully agreed as to what the usage was upon the subject.

The Court of Appeals will perceive that the Court below, in all that part of the instruction which we have considered, follows substantially the language of the prayers of the appellee, and that the instruction, thus far, submits to the jury the particular facts which they are to find, and concludes with the direction that if such facts are so found, the plaintiff (now appellee) is entitled to recover.

Is it not clear that the Court up to this point in the instruction, held that diligence was a question of law for the Court, and that the province of the jury was only to pass upon the particular facts, which the Court had set forth in the instruction as constituting want of diligence? Could there exist a clearer manifestation of the opinion of the Court that if the jury found the facts submitted to them, the negligence of the appellant was a conclusion of law drawn by the Court? The question of *diligence* is not submitted to the *jury* at all by the instruction, as far as we have here considered it, but the subject is left to the

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jury as a mixed question of law and fact, the Court authorizing the jury to find the facts and instructing it as to the law applicable to such facts.

But what is the effect of the proviso appended to the instruction of the Court? The preceding part of the prayer recited the particular acts and omissions which the Court directed the jury would entitle the appellee to recover, if the jury found such acts and omissions to have occurred. And the Court by deciding that such acts and omissions on the part of the appellant entitled the appellee to recover, of course decided that such acts and omissions constituted in law and as a conclusion of law, a want of due diligence. When, therefore, in the proviso, the Court say further, that the plaintiff is not entitled to recover, unless the jury shall also find that the appellant in failing to have the check presented for payment or endorsed as good by the Mechanics' Bank before three o'clock on the 30th October, 1860, was guilty of a want of due care, it abandoned all the ground of the former part of the instruction and submitted the question of diligence to the jury as a question of fact.

But the proviso is not liable to this objection only. The Court, if it intended to leave the question of diligence to the jury, ought to have left it to be found by the jury upon all the evidence in the cause, and was not authorized to submit to the jury, as a circumstance upon which their opinion might be based, the fact whether there had been a failure to present the check to the Mechanics' Bank for endorsement as good, or for payment before three o'clock. Because it is quite clear that a presentment after three o'clock was in time if there was a person at the Mechanics' Bank when the presentment was made with sufficient authority to return an answer, and such person refused to pay the check. *Garnett vs. Woodcock*, 1 *Stark. R.*, 475. 6 *M. & S.*, 44.

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Nor was the proviso consistent with itself in another particular. While the Court instructed the jury that the appellee was entitled to recover, if the jury found that the Merchants' Bank had been guilty of a want of due diligence in not presenting the check before three o'clock on the 30th of October, 1860, the Court also requires the jury to find as a fact essential to the appellee's right of recovery, that the check would have been paid if presented between one and three o'clock at the Mechanics' Bank.

Now, the only conclusion to be drawn from the first part of this proviso is, that the appellant had at least until three o'clock for the presentation of the check at the Mechanics' Bank, irrespective of the fact whether that check was good up to such hour or not. Why then was the jury also required to find that the check would have been paid by the Mechanics' Bank if it had been presented between one and two o'clock of that day? If the jury was authorized to find the Merchants' Bank guilty of negligence in failing to have the check presented before three o'clock, the Court must of necessity be understood as deciding that a presentment before three o'clock left no case of negligence for the jury. And it then would be certainly immaterial, if there was no evidence of negligence for the jury, whether the check would have been paid between one and two o'clock or not.

It is not proposed to discuss here at any great length the vexed question whether diligence is a question of law, or a question of fact, or a mixed question of law and fact. It is at all events not a question open to dispute in this State. If the evidence in a cause is not doubtful or contradictory, due diligence is a question of law for the Court. If the evidence is doubtful or contradictory, the facts must be left to the jury and the jury be directed that such and such facts, if found by the jury, constitute in law due diligence, or constitute in law the want of due diligence. But in every case, whether the facts be disputed or undis-

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puted, the question whether such facts when ascertained amount to due diligence, or the want of it, is a question of law to be decided by the Court. If the facts are not disputed then the Court settles the whole question. If the facts are disputed the jury must ascertain the facts, and the Court then determines whether such facts constitute due diligence, or a want of due diligence. That this is the law in Maryland sufficiently appears from *Patten & Jones vs. Wilmot*, 1 *H. & J.*, 477. *Penn., Del. and Md. Steam Nav. Co. vs. Hungerford*, 6 *G. & J.*, 291. *Bell vs. Hagerstown Bank*, 7 *Gill*, 233. *Sasscer vs. Farmers' Bank*, 4 *Md. Rep.*, 409. *Ewalt & Myers vs. Harden & Hopkins*, 16 *Md. Rep.*, 169, 170.

The only other points which we shall discuss in this case are raised by the third, fourth, fifth and sixth prayers of the appellant, which were rejected by the Court below, and the law of which was stated directly otherwise by the practical meaning of the instruction given by the Court.

In any form which the pleadings in this case on the part of the appellee might have assumed, it is clear that the foundation of *a right to sue*, on the part of the appellee, ought to have been a legal ownership in the fund appropriated by the draft of Hoffman & Co. on Josiah Lee & Co., not only at the time of the supposed damage, but also at the time of bringing the suit against the appellant. 1 *Ch. P.*, 2, 46. *Hollins vs. Barney*, 3 *H. & J.*, 437. It is not a suit brought *upon the bill* drawn by Hoffman & Co., and, therefore, the general rules authorizing the *holder* of such paper to bring suit in the name of such holder cannot be appealed to in any way to sustain the right of the Bank of Commerce to sue in this case. It is a suit brought upon the theory that *because of the negligent dealing of the appellant with the bill in question*, in contravention to an express or implied agreement, the *fund* assigned by such bill of exchange was

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lost. Now, if such a case of negligent dealing existed, who is the proper person to sue? There can be but one answer. It ought to be the person who was agreed with, and who has suffered damage by such negligent dealings, and to whom the fund thus negligently dealt with belonged at the time. Every other person, except such wrong-doer and such sufferer, was a stranger to the case.

If the appellant was guilty of negligence in its dealing as agent of the Bank of Commerce,—*and that question was properly presented in the instruction of the Superior Court,*—had the Bank of Commerce no right of suit whatever by reason of such negligence, even though it did experience no actual pecuniary loss? If we concede, for the sake of the argument, that it had in such case a right of suit, we are surely authorized to assert, that under such circumstances it could only recover *nominal damages.* Where the plaintiff gives no evidence of his loss the damage must be nominal. *Mayne on Damages*, 92 *Law Lib.*, 27, *m. p.* 3. *Sedgwick on Measure of Damages*, 47. *Dyer vs. Dorsey*, 1 *G. & J.*, 443. In this case no evidence of loss to the plaintiff was given or could be given.

The true law of the case, however, would seem to be that stated in the fourth prayer of the appellant, which recognizes the principle that the Bank of Commerce, by collecting its purchase money from Hoffman & Co., the drawers of the bill, condoned all its claims, and became thenceforth a stranger in interest. *Mayne on Damages*, 92 *Law Lib.*, 111. It cannot be doubted that if the Bank of Commerce had appeared as plaintiff in this action, without any intermingling of Hoffman & Co. in the cause, the proof of the fact that the Bank of Commerce had been repaid its purchase money in full, and had parted with all interest in the fund, would have left that bank with no other claim than to nominal damages, if to so much even.

The entry of the suit to the use of Hoffman & Co. cannot

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change the law of the case. There was never any contract or privity of contract between Hoffman & Co. and the appellant.

If they had not a right of action in themselves, the entry of the suit to their use no more enlarged the ground of claim, which *the Bank of Commerce* was authorized to make in this suit beyond *nominal* damages, than if the entry had been to the use of one who had never had lot or part in the whole transaction.

The Court of Appeals, however, cannot fail to perceive that the whole instruction of the Court below is founded upon the theory that the Bank of Commerce (although the sale under which it claimed title to the fund assigned by the bill of Hoffman & Co. had been rescinded, and the purchased money returned,) might claim damages precisely to the same extent as if the sale of such bill had never been rescinded, and the purchase money never had been repaid.

It is clear that the appellant was not the agent of Hoffman & Co., but of the Bank of Commerce, for the bill in question was *sold* to the Bank of Commerce before the agency of the appellant commenced. If the bill could have been collected, *except for the neglect of the appellant, the chosen agent of the Bank of Commerce,* it is perfectly clear that the Bank of Commerce had no right of action whatever, and no claim whatever against Hoffman & Co. for recovery of the purchase money paid for the bill, or against Hoffman & Co., as drawers of the bill in question. 1 *Parsons on Bills*, 355.

If Hoffman & Co. could have proved any such negligence as is asserted to be the foundation of the claims of the appellee in this case, they could, after repayment of the money to the Bank of Commerce, have recovered it back from that bank as money paid under a mistake of facts. 1 *Parsons on Bills*, 246. And the Bank of Commerce would

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then, after such money had been received from it, *for the first time*, have been authorized to sue the appellant, if it had neglected its duty. *It was essential to Hoffman & Co. (having refunded the purchase money of the draft) that this course should have been taken, even if negligence had been proved against the appellant.* The mere neglect of Hoffman & Co. to inform themselves as to their liability to the Bank of Commerce, before payment of the protested bill, cannot change the legal course of procedure, which ought to have been resorted to. They cannot, to avoid circuity of action, practically sue parties with whom they had no privity whatever.

The 4th prayer of the appellant was based upon the following propositions, which it was error in the Superior Court to have denied.

1. That the appellant could not be charged with want of due diligence without showing actual loss to the appellee, and that the facts in the case showed that no such loss had occurred.

2. That when the bill was returned to the Bank of Commerce and paid by the drawers it ceased to have any legal existence, unless the payment was actually annulled and the parties reinstated in the position which they occupied before such payment. *Byles on Bills, Am. Ed.*, 1853, 132, *N.* 1. *Ballard vs. Greenbush*, 24 *Me.*, 336. *Callow vs. Lawrence*, 3 *M. & S.*, 95. *Bartrum vs. Caddy*, 36 *Eng. C. L. Rep.*, 138. *Martin vs. Mechanics' Bank*, 6 *H. & J.*, 244. 2 *Parsons on Bills*, 216. *Burr vs. Smith*, 21 *Barb.*, 262.

3. That the appellee could have no right of action against the appellant before returning the draft to the appellant.

The first of these points has been sufficiently discussed in connection with other parts of the case, and the second is maintained by the authorities cited.

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As to the third point, the theory of the appellee is that negligence of the appellant charged the appellant in the same manner as if the draft had been actually collected by the appellant. But since the appellee demanded and received payment of the draft from Hoffman & Co., which it was only authorized to do upon the theory that the appellant had used due diligence, it affirmed and ratified the action of the appellant, and cannot be permitted to sue the appellant because of such action until it disaffirms it. It could only disaffirm it by returning the money to Hoffman & Co., and by returning the draft to the appellant before suit brought.

John H. Thomas, for the appellee, argued.

1st. That the instructions required the jury to find *every fact* necessary in law to the plaintiff's right of recovery, and the judgment ought not to be reversed, even if some of the defendant's prayers were abstractly correct. *Mutual Safety Insurance Co. vs Cohen*, 3 *Gill*, 459, 481, 482. *Keener vs. Harrod*, 2 *Md. Rep.*, 74. *Coates & Glenn vs. Sangston*, 5 *Md. Rep.*, 133. *Key vs. Dent*, 6 *Md. Rep.*, 142, 150, 151. *Canby vs. Frick*, 8 *Md. Rep.*, 163 *and* 168. *Edelin vs. Sanders*, 8 *Md. Rep.*, 118, 132. *New York Life Insurance Co. vs. Flack*, 3 *Md. Rep.*, 341, 356. *Keech vs. Balto. & Wash. R. R. Co.*, 17 *Md. Rep.*, 47

2nd. That if the instructions required the jury to find *more* facts than were necessary, the appellee on whom the burden was improperly imposed might have complained, but not the appellant who was benefited, not prejudiced thereby; and that the latter cannot urge as a ground for reversal any error by which it was not prejudiced. *Trieber vs. Knabe*, 12 *Md. Rep.*, 491, 497. *Mulliken vs. Boyce*, 1 *Gill*, 61, 65. *Chew vs. Beall*, 13 *Md. Rep.*, 349, 371. *Edelin vs. Sanders*, 8 *Md. Rep.*, 118, 132.

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3rd. That although the presentation of a negotiable instrument within a prescribed time is sufficient to fix the responsibility of parties to it, without reference to other circumstances, it is not always sufficient, and was not in this case, to relieve the collecting agent from responsibility. The latter is bound to use such skill and diligence as prudence requires, and if loss result to his principal from the want of them is liable therefor, although he may have done all that was necessary to establish the legal liability of all the parties to the instrument. 3 *Kent's Com.*, 82. *Allen vs. Suydam*, 17 *Wend.*, 370, 372. *The Mechanics' Bank, vs. Merchants' Bank*, 6 *Metcalf*, 20, 21, 26, 30. 2 *Parsons on Notes and Bills*, 85. *Byles on Bills*, 14. *Boddington vs. Schlencker*, 4 *Barn. & Adol.*, 752, 756, 757, 758 *and* 759.

4th. That the question whether due diligence has been used or not is one for the Court, where some definite thing alone is required to be done, as in an action against a party to a negotiable instrument, the presentation of which at a given time does or does not, as an absolute matter of law, amount to proper diligence; but where dependent on circumstances, as in this case, it is one for the jury, and was properly and fairly submitted to them. *Ewalt vs. Harding*, 16 *Md. Rep.*, 160, 170. *Patton vs. Wilmot*, 1 *H. & J.*, 477. *Edwards vs. Balt. Fire Insurance Co.*, 3 *Gill*, 189. *Keech vs. Balto. & Wash. R. R. Co.*, 17 *Md. Rep.*, 47.

5th. That whether that question belonged properly to the Court or the jury there was no error of which the appellant can complain; if to the Court the facts in the agreed statement, together with the facts proven, which were left to the jury, viz:—that Lee & Co. were in *doubtful credit* when the check was given, that it would have been paid on presentation at any time (as the proof shows) within two hours thereafter, or as the instruction puts it, more unfavorably for the appellee, to two o'clock, that the runner of the appellant, although within the same square

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as the bank on which it was drawn when he received it, kept it from one till a few minutes before or after three o'clock, when it had become worthless—would have compelled the Court to conclude that proper diligence had not been used, and the appellant was benefited by the Court's leaving that question to the jury and requiring them to find any additional fact, instead of itself determining the whole question in favor of the appellee; if within the province of the jury, the proviso submitted it to them, and the above mentioned facts, which they were required to find as essential to the plaintiff's right of recovery, were abundantly sufficient. The appellant's chances were improved by requiring them to find other facts, whether there was proof of them or not, and such other facts being immaterial, the appellant cannot complain, even if they were assumed by the Court or submitted to the jury without proof, which, however, the appellee will contend was not done. *Mulliken vs. Boyce*, 1 *Gill*, 60 *and* 65. *Mayor and City Council of Balto. vs. Norman*, 4 *Md. Rep.*, 352, 360, *Edelin ys. Sanders*, 8 *Md. Rep.*, 118, 132.

6th. The check being equivalent to money when received, the appellant having so treated it and credited the appellee with the draft as if actually paid in cash, the latter was entitled to recover, as for *money had and received*; every other fact was unimportant, and it is immaterial whether it was assumed by the Court or submitted to the jury without proof or not. See agreement as to the right to rely on any claim the facts may justify. *Balt. & Susq. R. R. Co. vs. Founce*, 6 *Gill*, 81. *Shanks vs. Dent*, 8 *Gill*, 120, 123. 12 *Barb., N. Y.*, 212.

7th. No fact was, however, assumed by the Court or submitted to the jury without proof. The witnesses, almost without exception, prove an uniform usage, requiring collecting banks to have checks drawn by persons of *doubtful credit* presented by the runner *at once* for payment or en-

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dorsement before returning to his own bank. The proof is equally full that Lee & Co. were in *bad credit* when the check was drawn. Hopkins, the President of the appellant, as early as ten o'clock that morning, knew the condition of the house and was endeavoring to raise money to prevent them from failing. The runner did not ordinarily start on his rounds before twelve o'clock, and had almost every day drafts on that house amounting to four or five thousand dollars. Mr. Hopkins had ample time to warn the runner. There is no hardship in charging the bank under such circumstances with the obligation to know what was known to so many, including its own chief officer. Most of the witnesses proved that the usage required *all* checks, whether drawn by persons in good or bad credit, to be presented by the runner *at once before returning to his own bank*, and that a runner who failed to comply with such usage did so at the risk of his own bank, and that as between the latter and its correspondent the check was under such circumstances by the usage a payment of the draft. The appellant was bound to conform to the usage of other banks, and did in fact do so by crediting the appellee with the amount of the draft. In requiring the jury to find that Lee & Co. were in *doubtful credit*, and ignoring the proof which rendered the appellant responsible for the retention of the check, without reference to their credit or sufficiency, the question was submitted in the way most onerous to the appellee, and most favorable to the appellant. *Bell vs. Hagerstown Bank*, 7 *Gill*, 227. *Chapman vs. Walton*, 10 *Bing.*, 57. *Story on Agency*, § 199. *Grant on Banking*, 93 *Law Lib.*, 70.

8th. It makes no difference whether the bill was a sight draft or not. It did not differ from one in any respect affecting this case. If it were otherwise the parties have called it a sight draft in their agreement. The appellant has referred to it as such in all its prayers. It cannot now

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deny, as matter of fact, that it was one, nor question the correctness of the designation so agreed to any more than it could the propriety of an instruction granted by consent. The agreed statement calls it a sight draft, but admits that Lee & Co. were bound to pay it on presentation. *Baugher vs. Wilkins*, 16 *Md. Rep.*, 35 *and* 46. *Swatara R. R. Co. vs. Brune*, 6 *Gill*, 48. *McColgan vs. Hopkins*, 17 *Md. Rep.*, 402.

9th. Technical objections that the Court assumed facts or submitted them to the jury without proof are no longer grounds for reversal. 1862, ch. 154, p. 176. *Calvert vs. Williams*, 10 *Md. Rep.*, 478, 486, 495. *Prout vs. Berry*, 2 *Gill*, 147 *and* 150. *Baugher vs. Nelson*, 9 *Gill*, 302, *Gover vs. Hall*, 3 *H. & J.*, 50.

10th. Hoffman & Co. might have recovered from the appellee the amount paid by them on the bill of exchange without knowledge of the facts, and would have instituted a suit for that purpose but for this mode of testing the liability of the appellant in the Courts of its own State, which was preferred by the latter. Such liability of the appellee was sufficient ground for action. 1 *Parsons on Bills*, 286. *Chew vs. Taylor*, 4 *H. & J.*, 54, 61. *Capron vs. Adams*, 21 *Md. Rep.*, 186.

11th. Courts will not inquire whether the legal plaintiff sues for himself or as trustee for another. The fact that his claim has been paid by the party to whose use the suit is entered does not affect his right to recover from the defendant. *Whiteford vs. Burkmeyer*, 1 *Gill*, 145. *Merryman vs. State*, 5 *H. & J.*, 423, 426 *and* 427. *Ellicott vs. Martin*, 6 *Md. Rep.*, 509, 516. *Whiting vs. Independent Mutual Insurance Company*, 15 *Md. Rep.*, 298, 313, 314, 315 *and* 316.

12th. Even if some of the appellant's prayers were abstractly right, if calculated to mislead the jury in their application to the case, they were properly rejected. *Clement vs. Small*, 9 *Gill*, 160.

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13th. The appellant's prayers were all properly rejected because, as heretofore shown, the whole law was covered by the Court's instructions, and even such prayers as may have been abstractly right were only calculated to mislead and embarrass the jury. They were, besides, all liable to special objections.

The first, second and seventh leave out of view the question at whose risk checks for sight drafts were, under the practice, taken; the evidence that it was the duty of the runner to present the check *at once* before returning to his own bank for payment or endorsement; that as between the appellant and appellee, the receipt and retention of it were a payment of the draft; and all the facts going to show that the appellant had not used the diligence and skill required of it by law as a collecting agent, and that it had actually treated the check as payment of the draft by passing $3,000 on its books to the credit of the appellee. The third and sixth are merely abstract. There was no attempt to charge the appellant as agent of any one else than the appellee or hold it responsible to any one else, nor to enlarge the measure of damages against it by entering the suit to anybody else's use, and the granting of these prayers would have only embarrassed and misled the jury, and they were properly refused for the reasons assigned under the 1st and 12th points.

The fourth asserts an erroneous principle. In an action against an agent for not collecting a negotiable instrument, it is not necessary to show that the principal has suffered actual damage. Failure to collect the money, and proof that it might have been collected, will entitle the principal to recover the amount of the instrument from his agent. *Sedgwick on Measure of Damages*, 339. *Decker vs. Matthews*, 5 *Sand.*, 439. *Same case*, 2 *Kernan*, (*N. Y. Sup. Ct. Rep.*,) 313.

That prayer and the fifth were also properly rejected,

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for the additional reasons assigned under the 1st, 10th and 11th points.

The seventh is liable to the objections already assigned, and to the further one that it refers only to the reason the runner may have had to doubt the credit of Josiah Lee & Co., and the fact that their failure created surprise with intelligent bankers and business men. The proof is that although *some* business men were surprised at the failure of that house, the community generally knew that they were in very bad credit, and it will be contended that a bank, undertaking to discharge a duty which requires a knowledge of people's credit, is bound to employ an agent possessed of necessary information so easily acquired.

14th. The instructions required the jury to find that the check was received before ten o'clock; that if it had been presented before two it would have been paid, but that it was not presented until a few minutes before or after three. This and the other facts left to the jury, were sufficient to entitle the plaintiff to recover, and the Court ought so to have instructed. Even if the proviso be considered as assuming that it was presented a few minutes after three, instead of a few minutes before, it was an immaterial fact. The proviso required the plaintiff to satisfy the jury of more than was necessary. The appellee might have complained of that, but not the appellant, as the latter was benefited by it. *Edelen vs. Sanders*, 8 *Md. Rep.*, 32. *Trieber vs. Knabe*, 12 *Md. Rep.*, 496, 497. *Mulliken vs. Boyce*, 1 *Gill*, 65. *Preston vs. Lightly*, 6 *Md. Rep.*, 98. *Coates & Glenn vs. Sangston*, 5 *Md. Rep.*, 121. *Canby vs. Frick*, 8 *Md. Rep.*, 168.

15th. No exception was taken to the proof of usage. The fact of the testimony having been taken subject to exceptions, does not entitle the appellant to object to it, without a prayer asking it to be excluded. *Coates & Glenn vs. Sangston*, 5 *Md. Rep.*, 127.

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16th. The practice of other banks, even if not uniform, and not binding as usage, was proper to show how other agents in similar business discharged such duties, and thus to show what would have been proper diligence on the part of the appellant. *Story on Agency*, *sec.* 186. *Canby vs. Flack*, 8 *Md. Rep.*, 168.

17th. The instruction given means that the *assumption* and *undertaking* to collect the draft were on the morning of the 30th; not that the thing was to be done on that day. Even if susceptible of a different interpretation, the proof as to the practice of other banks shows that such was the appellant's duty; and what the appellant did is certainly evidence of what it assumed and undertook to do.

18th. The appellant's undertaking was to collect the draft; not merely to preserve the liability of the parties to it. The appellant does not show a discharge of this duty by showing that his negligence did not release any of the parties to the draft; as between them and the holders, the draft might and ought to have been collected, and the liability of Lee & Co., even if preserved, became worthless while the check, which the appellant ought to have collected, was in its hands.

COCHRAN, J., delivered the opinion of this Court.

The question as to the right of action, raised by the appellant's 3d, 4th, 5th and 6th prayers, is the first to be considered.

The substantial proposition of these prayers is, that the appellant was relieved from liability for negligence in failing to collect the draft on Lee & Co., by the subsequent payment of it by Hoffman & Co., notwithstanding their liability upon it as drawers was extinguished by that negligence, and their payment made under a mistake of fact that legally entitles them to a return of the money. The

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effect of this payment on the appellee's right of action is, therefore, the real matter to be considered. The theory of the appellant in regard to it appears to us to be founded, in some measure, upon a misapprehension of the principles applicable to that state of case. Treating the payment, according to the hypothesis of these prayers, as one made by mistake, it certainly was one that conferred no benefit on the appellee, and we think it equally clear that it could not operate for the advantage of the appellant in the way of discharging, or suspending its antecedent liability to the appellee. As the amount of the draft was paid by Hoffman & Co., under a mistake that entitles them to a return of the money, the appellee must be regarded as having received it for their use, and as holding it subject to their order. In legal contemplation the payment was a deposit, for which the appellee must account, and which, instead of suspending or discharging the appellants from their existing liability to the appellee, charges the appellee with one of an entirely different character to Hoffman & Co. This in our opinion was the only legal effect of that transaction, and there is no reason for supposing that it changed or affected, in the slightest degree, any right or liability growing out of, or founded upon the previous relations of the parties here. The cases of *Merryman vs. State*, 5 *H. & J.*, 423, and *Whitney vs. Ind. Mut. Ins. Co.*, 15 *Md. Rep.*, 298, bear upon this question and tend to support the conclusion we have reached.

Nor was it essential to the appellee's right of action, that the jury should find that the draft was returned to the appellant. The claim asserted here, is not upon the draft, but one sounding in damages for the loss caused by the appellant's negligence and consequent failure to collect it; the appellant did not undertake for the payment of the draft, but to exercise due care and diligence in collecting it, an undertaking wholly different in its nature from that

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of any insurer, surety or party to the draft, and one that renders the production and return of the draft unnecessary to the appellee's right to recover.

But this is not all ; the case proceeded on the theory that the draft was rendered valueless by the appellant's misconduct in regard to it, and if there was evidence from which that fact could be, or was found, there is no reason for supposing that the appellant was prejudiced by the appellee's failure to surrender it. We think these prayers were properly rejected.

A review of the objections, made to the instructions given by the Court in lieu of all the prayers offered on both sides, will dispose of the remaining questions presented by the bill of exceptions. These objections are founded mainly on two grounds, 1st, that the instruction treats the question of diligence as one of fact for determination by the jury ; and 2d, that it submits that question to the jury on a hypothesis of fact, in some particulars calculated to mislead them, and in others not authorized by the evidence.

A careful examination of the case made by the proof has satisfied us that these objections cannot prevail. It is true beyond doubt that in cases of this character, a Court may, by proper legal inferences from the nature of the undertaking, determine in general the things required to be done in performing it, and that the failure to do any of the things, so required to be done, would amount to negligence ; but it has no such power when the question as to due diligence is made to depend on a state of facts and circumstances of a character so unusual that they could not have been contemplated by the parties to the undertaking, and to which no settled rule of law can be applied. The principle for testing the force of this objection, is, we think, correctly stated in the case of *Balt. & Ohio R. R. Co. vs. Worthington*, 21 *Md. Rep.*, 275. It was there said, a majority of the Court concurring, "that negligence in

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the ordinary legal sense imports an absence or want of such care as the law requires in the performance of any given undertaking, and generally speaking is a fact, the finding of which is for the jury, although the Court may declare the legal nature and extent of the duties incident to the undertaking, as well as those facts which by inference of law are essential to its performance;" and again that the Court may determine the question in cases "where the negligence alleged may be deduced from the absence of any fact which the law of the contract presupposes, and requires should be shown." The question here did not depend on evidence of any omission on the part of the appellant to do those things which, by the settled rules of law, applicable to the undertaking, were necessary to its performance, but upon the proof of facts and circumstances that might have added to or changed the conditions of the duty to be performed, but in that respect of a character too uncertain to authorize a judicial determination of their effect. We think the question was properly submitted as one within the province of the jury.

The material point of the remaining objection is that the instruction submitted the question as to the "doubtful credit" of Lee & Co., to the jury as a fact bearing on the question of due care and diligence, without requiring them to find that the appellant had knowledge of it at the time of presenting the draft and receiving the check. We do not understand the words "doubtful credit" in the restricted sense contended for by the appellant. These terms are very comprehensive, and when used, as here, without words of limitation or qualification, are understood to mean reputation or standing in the community, as distinguished from the estimate of particular individuals. In that sense, the "doubtful credit" of Lee & Co., when found, was a fact of which the appellant presumptively had knowledge, and for that reason it was not necessary that such

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knowledge should be otherwise ascertained. The other facts submitted to the jury, were all of them such as they could properly consider in passing on the question of negligence. There was evidence from which all of them could be found, and so far as we can discover, none of them were calculated to mislead the jury in finding their verdict. The ambiguity complained of by the appellant appears, upon reading the whole instruction, to be entirely removed, and we think, upon a full consideration of the whole case, that the judgment should be affirmed.

Judgment affirmed.

(Decided February 19th, 1866.)

LEWIS TURNER *vs.* HENRY KNELL.

PRACTICE IN EQUITY: BILL OF DISCOVERY: EVIDENCE: RESPONSIVE ALLEGATIONS OF ANSWER.—The answer of a defendant to a bill of discovery, if responsive, is evidence for the defendant, unless overcome by the testimony of two witnesses, or one witness with corroborating circumstances.

Where the bill called for a discovery as to the consideration for a note given to the defendant by the complainant, and alleged to have been for the accommodation of the defendant, and the latter stated in his answer that the note was discounted at bank by him, and detailed circumstances showing how the proceeds enured to the benefit of the complainant, HELD:

That all the matter stated referred to one transaction—the enuring of the proceeds of the discount to the use and benefit of the complainant, and was responsive as to the subject really in controversy between the parties.

APPEAL from the Circuit Court for Baltimore City.

The bill in this case was filed by the appellant against the appellee for an injunction to restrain the appellee from prosecuting a suit against the appellant upon a promissory

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note for $1,000, made by the appellant and passed by him to the appellee, and for a discovery as to the consideration of the note. The first and second answers were excepted to, and the appellee was required to file a third answer, in which he stated that he had the note discounted at bank, and applied $500 of the proceeds to reimburse himself for a note of the appellant's for $500 paid by him, and paid over the balance of the proceeds to the appellant. The Court below (KREBS, J.) held that this answer in so far as it stated what application was made of the proceeds of the note was responsive to the bill, and from this decision the complainant appealed.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

B. C. Barroll, for the appellant.

1. It is conceded by the record that the note in controversy passed from Turner to Knell on the day of its date, *without consideration.* Knell's second answer so admits unequivocally.

2. It is proved and conceded in the record, that Knell got it discounted for himself at the Western Bank, and received the entire proceeds from the bank.

3. It is alleged by Knell in his third answer, that he paid a note of $500 for Turner, and handed over to Turner the balance of the money, after he received it from the bank. *Of this there is not a particle of evidence.*

4. The statements of the third point are contradicted by the evidence of Raefle and Stockdale. Knell, in conversation with them, (while the matter was recent,) contended that Turner's obligation to pay the note in controversy arose from the fact that Knell had paid a note for Turner on the 13th of January, 1854, at the Farmers' and Mer-

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chants' Bank, of $1,000—Knell saying that he got the money to make such payment from Stockdale on the day mentioned, and that Stockdale took him down in his buggy, &c.

But Stockdale proves that Knell got no money from him on or before the 13th of January, as alleged. That the loan of the $1,000 took place some eleven or twelve days afterwards, which utterly refutes the statement of Knell, that he paid any note for Turner on the 13th of January.

But suppose he did—then this view of the case is subversive and contradictory of the facts set up in all the answers, and a defendant must stand upon his allegations as contained in the pleadings.

5. If the answers are contradictory, and repugnant each to the other, are they not all to be rejected, and the case made to stand upon the allegations in the bill, as made and sworn to by the complainant?

The answers set up, by way of *avoidance*, other matters which *subsequently* occurred after Knell endorsed the note and used it. See the rule stated in *Clark vs. White*, 12 *Peters*, 189. "If the answer of the defendant admits a fact, *but insists on matter of avoidance*, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance." See also *Gibson vs. McCormick*, 10 *G. & J.*, 65,—where it is said, "An answer will not support a matter set up in discharge, when the matter of avoidance is a distinct fact—in such a case the defense must be proved."

When the issue joined involves a negative averment, such as that no consideration passed for a note, and the party replies that the consideration was the payment by him of a note for $500, &c., in such case, the fact being peculiarly within the knowledge of the party asserting the affirmative, the *onus* of proof is upon him; otherwise, you put upon the other side the proof of a negative, which is not allowed,

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for the reason assigned in all the text books on evidence, that a negative does not admit of the direct and simple proof of which the affirmative is capable. 1 *Greenlf. Ev.*, *secs.* 74, 79.

Further to show that the matters set up in avoidance by Knell, go for nothing in the answer unless made out by proof—*See Ringgold vs. Ringgold*, 1 *H. & G.*, 81.

An answer will not support a matter set up in avoidance, or discharge where the matter of avoidance is a distinct fact: in such case the defense must be proved. *Pothier on Obligations*, 157. *Gilbert*, 51. *Tenn Eyck's Case*, 2 *John's Ch. Rep.*, 62, 89. *Thomas vs. Lambe*, 7 *Ves.*, 587. *Boardman vs. Jackson*, 2 *Ball & Beat.*, 382. *Bush vs. Livingston*, 2 *Caine's Ca. Bartlett vs. Gale*, 4 *Paige*, 507. *Fitzhugh et al. vs. McPherson*, 3 *Gill*, 429. *Jones vs. Belt*, 2 *Gill*, 120. *Randall vs. Phillips*, 3 *Mason*, 383.

The case now before the Court is not only within the principles set forth in these cases, but much stronger. Knell received the note on the 13th day of February, got it discounted on the 14th—does not tell when he paid the note for $500, or when he paid over the balance, or when he drew it out of bank. These facts, (even if true,) make an entirely different transaction from that which occurred between Turner and himself on the 13th of February, 1854—and cannot have the force of an avoidance and discharge, unless sustained by proof. It might be conceded, however, that where an admission is qualified, the qualifications form part of the admission—otherwise, the admission is not the admission the respondent intended to make. But the averments of the bill in this case related to a specific transaction which occurred at a specific time—to wit: the transaction of the making and delivery of the note on the 13th of February, 1854.

The clear admission (unqualified) in the answer is in relation to that transaction, that no consideration or value

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was given for the note—here the transaction set forth in the bill ceases. But Knell goes on and relates other transactions, which occurred afterwards: that he got the note discounted on the 14th of February: that he got the money from the bank; and that he paid some of the money to Turner and kept a part, $500, to reimburse himself for a note which he paid for Turner about that time.

This is not an explanation or qualification of the admission. No consideration or value passed at the time inquired of: that is the admission,—yet, that subsequent dealings took place, he says, between them, which entitle him to recover on the note in a Court of law, because he paid the note as endorser. These may be all true, but they relate to a subsequent and different transaction. These things, (if they occurred,) took place on and after the 14th of February—and as to the note of $500, he does not say when he paid it. The rule is that you are not to divide a sentence so as to make a man admit something which he does not intend to admit. But a man cannot make a clear admission, which he is bound to make if he tells the truth, and then set up other facts, the legal effect of which he hopes may nullify the force of the admission. In the case at bar, the admission is in one answer, and the matters in avoidance in a subsequent answer.

Samuel Snowden, for appellee, argued:

1st. That it is not conceded by the record that the note in controversy passed from Turner to Knell without consideration, nor does his answer so admit.

2nd. That it is proved and shown by the record that Knell got it discounted at the Western Bank for Turner and paid Turner, or for or on his account the entire proceeds.

3rd. That the answer of the appellee is consistent

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throughout its amendments and responsive to the bill and exceptions, and the plaintiff has utterly failed to disprove it.

4th. That the plaintiff was not entitled to a discovery in the Circuit Court for Baltimore City, and that the bill was properly dismissed.

5th. That the answer of the defendant is evidence and establishes his claim.

6th. That the averment of payment over of the proceeds is not new matter that requires to be proved, but is a part of the original transaction.

In support of the above points, he cited the following authorities:

Lady Ormond vs. Hutchinson, 13 *Ves. Jr.*, 53. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.*, 86. *Green vs. Vardinian*, 4 *Blackf.*, 330. *Cooper vs. Tappan*, 9 *Wis.*, 267. *Glenn vs. Grover & McColm*, 3 *Md. Rep.*, 226.

WEISEL, J., delivered the opinion of this Court.

We concur with the learned Judge of the Circuit Court for Baltimore City, from whose decree this appeal has been taken, in his conclusions as to the law and the facts in this case. The answer of a defendant to a bill of discovery, if responsive, is evidence for the defendant, unless overcome by the testimony of two witnesses, or one witness with corroborating circumstances. The answers in this case are responsive, and there is no sufficient countervailing proof. The evidence has been well scanned and analyzed by the Court below in its opinion, and we do not dissent from the views therein taken of it.

The appellant relied much upon the ground that the circumstances stated by the appellee in his third amended answer as to the mode or manner in which the complain-

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ant received the benefit of the discount in the Western Bank, were new matter set up in avoidance, and therefore required proof to support them from the defendant. We do not embrace this view. All the matter stated referred to one transaction—the enuring of the proceeds of the discount to the use and benefit of the appellant—and was responsive as to the subject really in controversy between the parties. The explanatory facts, showing how he received the proceeds, were necessary parts of a full answer, and for the want of which exceptions were filed to the first answer. They are not matter in avoidance, but of explanation or detail, and necessary to the full answer sought by the exceptions. The distinction between matter of this kind, and matters strictly in avoidance, is well taken in *Cooper & Haines vs. Tappan*, 9 *Wiscon. R.* 366, 367. *See also Glenn vs. Grover*, 3 *Md. Rep.*, 226.

The defendant below should have answered fully and particularly at first. The circumstance that his answers were twice ruled insufficient, with some other facts in the case of a mysterious nature, are calculated to throw doubt upon the justice of his cause; but having been made a witness by the bill of discovery, and the matter of his answers being, as has been stated, fully responsive to the bill, without being met by sufficient countervailing proof, the complainant must abide by the answer.

The decree below will, therefore, be affirmed, with costs to the appellee.

Decree affirmed with costs.

(Decided February 21, 1866.)

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DANIEL B. BANKS *vs.* ELIZA A. MCCLELLAN.

USURY : JURISDICTION IN EQUITY.—Where property is mortgaged to secure a debt affected with usury, the assignee of the equity of redemption is entitled to the aid of a Court of Equity to redeem the property by paying the mortgage debt and simple interest thereon, or by bringing the same into Court to be paid, if a proffer to that effect is contained in the bill.

Where property subject to a mortgage, is sold clear of the mortgage, and certain certificates of stock, part of the purchase money, are deposited with a third party to await the determination of the amount due upon the mortgage, (the mortgagor claiming that the mortgage was in part usurious and should be reduced in amount,) and afterwards the vendor assigned his interest in the certificates, the assignee agreeing to pay the amount actually due on the mortgage so as to release the stock, HELD :

That the assignee may maintain a bill in equity against the mortgagee, to have the question of usury and the true amount of the mortgage debt determined.

ASSIGNMENT OF CHOSES IN ACTION.—The assignment also carried the rights of the assignor in and to certain real estate which he had conveyed absolutely to said mortgagee, but which conveyance by private understanding between him and said mortgagee was to be treated as a mortgage, and the latter in fraud of said agreement had sold the property to a third person, and the assignee of the stock sought to have this fraudulent sale accounted for so as to further reduce the amount due upon the stock, HELD :

1st. That these matters of the assignment are not to be regarded as unmixed choses in action for the payment of money within the meaning of the act of 1829, ch. 51.

2nd. That as assignee of the mortgagor's rights in reference to the real estate, if the transaction in relation to it between the assignor and the defendant was intended merely as a security for a loan, the complainant can resort to a Court of Equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property upon payment of the amount properly due; or if the property has passed beyond her reach, and the mortgagee be overpaid, for a decree ordering an account and repayment of the difference.

USURY : COMPOUND INTEREST.—Money due for interest may, by agreement, be changed into principal to bear interest *in futuro*, but not otherwise.

An agreement by the mortgagor to pay the taxes on the mortgage debt, is not usurious.

An assignee standing in legal privity with the mortgagor may avoid the contract for the excess of usury, and is entitled to the proper reduction on the mortgage debt.

EVIDENCE : COMPETENCY OF WITNESS.—A mortgagor who has assigned all his interest in the mortgaged property without recourse, may in a suit brought by the assignee be a witness to prove that the mortgage debt was affected with usury.

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Banks *vs.* McClellan.

APPEAL from the Superior Court of Baltimore city sitting in equity.

The bill of complaint of Eliza A. McClellan, (the appellee,) filed the 1st of July, 1859, sets forth as follows: In May, 1841, William McClellan applied to Daniel B. Banks, the appellant, for a loan of $1,500, to which Banks would assent only upon the terms that it should be taken in fifteen shares of Gas Company stock, the par value of which was $100 a share, but which was then worth in the market only $90 a share, or $1,350, less broker's commissions. As security for the loan the said McClellan offered to mortgage a ground rent of $100 a year, issuing out of a lot on Bank lane, in Baltimore. This was accepted by Banks, and McClellan on his part consented to take the gas stock in lieu of money. A mortgage prepared in accordance with the agreement was executed and acknowledged by W. W. McClellan and wife, on the 18th day of May, 1841, before T. Hanson Belt and William P. Stewart, Justices of the Peace, and tendered to Banks, but he declined to accept it, and required instead a deed absolute in form. Under this requirement and the restraint imposed by pecuniary necessity, the said McClellan and his wife executed and delivered to Banks an absolute conveyance of the rent and reversion, under the understanding that it should have the same effect as a mortgage—Banks agreeing to reconvey the property after the expiration of three years, and meanwhile receiving, as interest upon said loan, the said yearly rent of $100. At the end of three years, McClellan, applying to Banks to ascertain if he required payment of the debt, was informed by the latter that the loan might continue, the said Banks still receiving the annual rent as interest, and holding himself ready to reconvey at any time, upon receiving payment of the principal. Had Banks required payment then or at any other time, McClellan would not have had the slightest difficulty in selling the rent at the rate of six

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per cent., as it was on a permanent lease and well secured. But Banks assured McClellan that the said arrangement should last until it might be convenient for McClellan to pay the debt, unless Banks himself should sooner think fit to require payment. But, in disregard of his obligation, the appellant, after receiving the said rent regularly as it became due, as for interest, on the 25th of May, 1860, sold and conveyed the said rent and reversion to John Gibson, for the sum of $1,700. The sale was made without any notice whatever to McClellan, who did not obtain knowledge of it till long afterwards—nor then by any communication from Banks. The appellant never accounted with McClellan for the proceeds of the sale, or for the rent, although requested by him to do so and to pay him the excess of moneys received over and above the true amount of the loan; in other words, over the sum the gas stock sold for, viz: $1,350.

The bill further states that to secure payment of a note of Wm. W. McClellan, endorsed by Catharine M. McClellan, for $1,060, (sixty dollars of the amount representing one year's interest, and the note as to the remaining one thousand dollars being in fact given for only two-thirds of that sum lent by said Banks to said Catharine,) Catharine M. McClellan mortgaged to said Banks, on or about the 23d of July, 1844, a certain lot on Baltimore street, near Green street, particularly described in the mortgage; that on the 3d of June, 1845, the said Catharine M. McClellan conveyed the said last mentioned lot to William W. McClellan; that a contract was entered into between McClellan and one Purcell, for a lease to the latter of part of said mortgaged ground at a stipulated rent; and in order to carry it into effect McClellan and his wife, on the 18th of April, 1850, conveyed the same part to Banks, (who, as above stated, had a mortgage upon the whole,) and Banks then executed a lease to Purcell, reserving the rent agreed upon.

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The understanding upon which these last mentioned conveyances were made is shown in the following agreement, under the hand and seal of the appellant:

Upon the payment to the undersigned, at any time within six months from the date hereof, of the debt or sum of one thousand dollars mentioned, to be secured by an indenture of mortgage from Catharine McClellan to Daniel B. Banks, bearing date the 23d of July, 1844, and recorded among the Land Records of Baltimore County, in Liber T. K., No. 344, folio 462, &c., with interest on said sum of $1,000 from the 8th day of January, 1850, I hereby bind and oblige myself and my representatives to reconvey to William W. McClellan, or to his representatives, the lot of ground conveyed to me by said McClellan and Maria, his wife, by indenture dated the 18th day of April, 1850, and intended to be recorded among the Land Records of Baltimore City, subject to the lease this day executed by me and my wife to John T. Purcell; and I also bind and oblige myself to release the balance of the property mentioned in the mortgage above referred to from the operation of said mortgage.

The bill further shows, that the said Wm. W. McClellan being in need of the sum of $1,625 to complete the payment of the purchase money of a piece of ground on the east side of Charles street, which had been sold to him, under a decree of the Court of Chancery, by Grafton L. Dulany, trustee, applied to the appellant for the loan of said amount, offering a mortgage of the same property as security; that Banks, however, preferred that his security should take the form of an absolute conveyance of the property, and exacted interest at the rate of twelve per cent. per annum; and these terms McClellan was compelled to submit to, to prevent a resale of the property by the trustee for default of payment of the unpaid residue of purchase money, and the said ground was accordingly conveyed in form absolutely to the appellant; that he agreed with McClellan that on re-

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payment of the said loan of $1,625 within one year thereafter, with interest at the aforesaid rate, he would convey over the said ground to said McClellan; that within four months, however, McClellan offered to pay the said sum of $1,625, with the said usurious interest; but Banks, in fraud of his agreement and of the trust on which the property was conveyed to him, refused to receive the said debt and interest, or to convey and release said ground, untruly asserting that the said property was his own absolutely,—free of all trust or obligation, on his part, to convey the same, in any event, to the said McClellan; that said Banks was aware that the said piece of ground was indispensable to McClellan as a constituent part of a large property, which he was about to charge with a permanent rent for the purpose of raising a sum of money which was then very important to him; and so knowing, Banks availed himself of the circumstances pressing upon McClellan, to dictate to the latter the harsh and grinding terms on compliance with which he was willing to fulfill his equitable obligation to convey said ground; that he insisted, as the condition on which he would perform his agreement, that McClellan should give him a mortgage of two adjoining parcels, situated on the east side of Charles street, to secure payment of an usuriously made up sum and falsely presented debt of $1,288.60, the composition of which will be presently explained; that under such duress, McClellan yielded to this grievous exaction, and executed to the appellant the demanded mortgage, paid the appellant his said debt of $1,625, and received a conveyance of the property mentioned in the said deed from Mr. Dulany, trustee; that the interest on this $1,625, calculated by Banks at the rate of twelve per cent. per annum, was included in said sum of $1,288.60.

The bill further shows that, for a valuable consideration, Wm. W. McClellan assigned and conveyed all his claims above mentioned, and the rent and reversion of the ground

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leased to Purcell, and the residue of the ground mentioned in the said mortgage of the 23d of July, 1844, unto the complainant, Eliza A. McClellan. (See deed from William W. McClellan to Eliza A. McClellan, dated 25th June, 1859.)

And the complainant, in fulfillment of the obligations assumed in taking said assignment and conveyance, states her readiness, and by her bill offers, to pay the appellant or to bring into Court, the said $1,000, with interest thereon from the said 8th day of January, 1850, together with the said sum of $39.27, with interest thereon from the 6th day of May, 1850, and such other sums as the Court may adjudge.

The bill further states that Wm. W. McClellan before his said assignment to the complainant, and the complainant subsequently thereto, had in vain applied to the said Daniel B. Banks to account as aforesaid, accept payment of the moneys due him, and execute the said equitable releases and conveyances.

The bill prays that on payment by the complainant, or bringing into Court for due payment, the said sum of one thousand dollars and interest as aforesaid, and said sum of thirty-nine dollars and twenty-seven cents and interest as aforesaid, and any further sums that the Court may adjudge to be equitably due, the said Banks may be decreed to convey to the complainant and her heirs the said rent and reversion of said ground leased to Purcell, and the other ground embraced in the said mortgage from Catharine M. McClellan, and that the said mortgage of the 6th of May, 1850, may on the payments aforesaid being made, or the said sums brought into Court, be decreed to be released by said Banks, and be adjudged to be satisfied, released and made of no effect, with the prayer for general relief.

The defendant, now appellant, was summoned, and an interlocutory decree having been duly signed, a commission

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issued under which the several exhibits were proved and evidence taken.

On the 18th of January, 1842, it was agreed between the parties, that the interlocutory decree should be stricken out, and that the defendant might file his answer, upon the terms, that all those parts of said answer which rely on the bar or objection of limitations, or lapse of time, or staleness of claim, or laches of any party or person, should be considered as struck out, and that such objection should not be relied on, under any view or pretensions, at the hearing. All the testimony taken on the part of the complainant to stand as if the agreement had not been made, nor the interlocutory decree struck out, with leave to the defendant to cross-examine.

The appellant's answer denies that he ever had any dealing with William W. McClellan respecting the Bank lane ground rent, and insists that he purchased the same, giving the gas stock in exchange. As to the other transactions, he contends that they ought to be considered as concluded by settlements.

The general replication was put in, and a commission to take testimony having been issued, William W. McClellan was examined by the defendant (now appellant) upon interrogatories touching the consideration of the assignment to the complainant, and also touching his own motive in making said assignment. Having testified fully upon the former branch, and stated that the conveyance was complete and absolute, that he had no interest in the suit, and had entered into possession and enjoyment of the property conveyed to him by the complainant as the consideration, he was asked by the defendant's solicitor, "Was it your object to make yourself qualified as a witness to testify in this case?" and he answered that such was his object, and he wished to part with any interest he might have in order to make himself a disinterested witness. Further examined on the part

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of the complainant, he testified that he wished to part with any interest he had in the claim, so that in the event of his being called on as a witness he might testify in the case; and that he did not agree with his sister to testify, but stated to her that if he should be called on as a witness he would testify to the truth of the transaction. He further stated that he had no interest of any sort in testifying in the transaction.

Upon the return of the commission, the complainant filed an exception to all the testimony of William W. McClellan on his examination on the part of the defendant touching his object or motive for making the assignment of claim and conveyance of interest to the complainant.

The defendant excepted to the admissibility of the testimony of said William W. McClellan.

The cause being submitted, a decretal order was signed by the Court below, (MARTIN, J.,) directing the auditor to state accounts, and this appeal is taken from the action of the Court in reference to the account stated by the auditor.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

I. Nevitt Steele and *Oliver Miller* for appellant.

1st. The first question in the case is as to the admissibility of the testimony of William W. McClellan; without his testimony the whole case of the appellee fails. The complainant in the bill had no interest in the matters complained of therein, until the assignment to her by this witness was executed: This assignment was put on record the very day the bill was filed, and the witness admits on his cross-examination that his object in making it, was to qualify himself as a witness to testify in the cause. The

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case is peculiar in several respects. This witness could have filed the bill in his own name, but he would then be disqualified as a witness. As the law then stood he could not have proved his case. As the law *now* stands, *both parties* could have testified. Under the law then existing, the defendant's answer under oath could not be received as evidence, because the bill did not call upon him to answer under oath. The effect, therefore, of this assignment if sustained, is to make another party complainant, who could so frame her bill as to avoid the effect of the defendant's answer as evidence, and thus get rid of *him* as a witness, and make the party really interested a competent witness in his own case. It is conceded that when *in the course of a trial* it is shown that a witness is interested, the decisions of this Court have held that a release, though made for the avowed object of making him competent, will have that effect, but they have at the same time said, that if it were a new question they would condemn the practice. Here the assignment was made just before the suit was instituted, and for the purpose of having it instituted, and making the assignor a witness in the suit about to be commenced, it is submitted on the part of the appellant that it is against the policy of the law, and ought not to be sustained; that it is wanting in *bona fides*, and was in fact executed for a purpose which the Court should condemn rather than sanction. Act of 1829, ch. 51. *Crawford vs. Brooke*, 4 *Gill*, 213. *Pegg vs. Warford*, 7 *Md. Rep.*, 582.

2nd. But assuming that McClellan was a competent witness, the next question is, can the Court upon that evidence declare the absolute deed of May 28th, 1841, a *mortgage*? The proposition that it is competent for a Court of Equity upon the allegation and *proof of fraud*, to decree an absolute deed to be a mortgage, is not disputed. But in such a case the Courts have uniformly *held* that *the proof* upon which it so acts must be clear, strong, unequivocal. There is

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nothing in this case to exempt it from the operation of this rule as to proof. The deed is *absolute on its face*, was placed on the public records of the county the day after its execution, and *nine* years after its execution the grantee conveyed the property to a *bona fide* purchaser, whose deed was also spread upon the record, and now more than *eighteen years* after its execution, the effort is to show that it was not what it purports to be, but an entirely different instrument.—The proof to sustain such an allegation after such a lapse of time, ought to be of the strongest character. There is no such proof, and no such corroborating circumstances here, for:

1st. The witness though not, as now assumed, legally incompetent, is nevertheless liable to suspicion. All the cases, whilst holding that a release may restore the *competency* of a witness, declare that the fact of the execution of such a release for the avowed object of making him a witness, *affects* the *credibility* of the witness. The evidence in such cases comes from a tainted source. The Court will regard this circumstance in this case, and will be slow to give implicit credence to a witness, who has assigned his claim to *his sister*, for the very purpose of having this suit brought, and with the avowed object of becoming a *witness* therein. The whole record shows that he was the instigator and prime mover in getting up these proceedings, and that he is prejudiced, biased and deeply *interested* (in every sense of the word except legally,) therein, cannot be doubted.

2nd. The utter absence of all *corroborating circumstances* to sustain the testimony he has given, is also to be strongly weighed by the Court. Indeed, the attendant circumstances are all the other way. The fact that the proffered *mortgage* was absolutely refused, that there was no such *inadequacy of price*, (a circumstance strongly relied on in other

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cases,) as to warrant the Court in saying the parties did not intend this to be an absolute deed; and finally, the fact that during all these *eighteen years*, the matter was suffered to rest, and Banks and his grantee permitted to remain in absolute and uncontrolled possession of the property, without any claim, demand or disturbance on the part of McClellan, though the Record shows that during this period there had been various transactions, and even strong controversies and disputes between these parties; all these facts we say show that but little credit can be given to his bare assertion made at this late day, that the deed was a mortgage and not what it purported to be on its face.

3rd. The fact testified to by this witness himself, that as late as October, 1858, he tendered to Banks $2,300 in full satisfaction of *all* his claims, and demanded from him a reconveyance of the Purcell annuity, and a release of the mortgage of May 6th, 1850, and that he made this offer for the purpose of having *all matters settled*, is utterly inconsistent with the idea that he then thought that he had any claim on account of this deed of 1841. His purpose in making the offer was to have *all matters* settled between him and Banks, and what he then *demanded* from Banks was, not *an account* of the Gibson annuity, but simply a reconveyance of the Purcell annuity, a release of the mortgage of 1850.

We insist, therefore, that the proof entirely fails to come up to the standard required by the authorities to warrant a Court in treating as a mortgage an absolute conveyance like this; that, upon such proof, so to treat it would lead to infinite mischief by shaking security in titles, and disturbing faith in the most solemn conventions of parties.—*Thompson vs. Banks*, 2 *Md. Ch. Dec.*, 432. *Watkins vs. Stockett*, 6 *H. & J.*, 444. *Brogden vs. Walker*, 2 *H. & J.*, 285. *Farrell vs. Bean*, 10 *Md. Rep.*, 230. *Russell vs. Southard*, 12 *How.*, 147. 1 *Russell on Cr.*, 180.

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4th. Assuming again the deed of May 28th, 1841, is to be treated as a mortgage, and that Banks is bound to account for the annual rent of $100 received by him, and for the purchase money for which he sold it to Gibson on the 25th of May, 1850, on what basis is that account to be taken? We say that it is to be treated as a mortgage for $1,500, and the appellant is to be charged with that sum as of the date of the mortgage, and be credited with the annual payment of the ground rent, and the proceeds of the property when sold. This was the solemn agreement between the parties expressed upon the face of the mortgage itself, and not contradicted by the testimony or controverted by the bill. There was no *usury* in this agreement, and the bill does not assail this transaction on the ground of usury.—Banks had a perfect right to *sell* his stock *at par*, and it was perfectly competent for him to take a mortgage to secure the payment of the sum for which he sold it, and it was perfectly competent for McClellan to agree to buy the stock at that rate, and to execute the mortgage. The plea of usury, even if relied on, would not avail against such an agreement as that. The only usury in this matter consists in the agreement to receive, and in the receiving of the $100 *as interest* on the $1,500 so loaned; and this, by the accounting, in so far as it exceeds the legal rate of six per cent. on the $1,500, Banks must lose, if this deed is to be treated as a mortgage. This transaction was not a *loan* of this stock, to be *returned* with usurious interest, but a sale of it at a *fixed price*, agreed upon between the parties. The account is therefore wrong, in making the $1,350 the price at which McClellan *subsequently sold* the stock, the basis of the accounting. *Williams vs. Reynolds*, 10 *Md. Rep.*, 57. *McKim vs. White*, 2 *Md. Ch. Dec.*, 510.

5th. Again, as to the transaction of May 6th, 1850. Here the consideration of the mortgage of that date is

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assailed as usurious, and the agreement upon which that mortgage is based is attached as founded in usury. Now, what was the state of the case between these parties at that time? and what was it competent for them to contract about? It must be remembered that under our present usury laws the excessive interest alone is forfeited—the agreement is not annulled—it stands in all respects valid, save in regard to the excess of interest above the legal rate. At the time this agreement was made there was due to Banks six years interest on the $1,000 mortgage, of which he had not received a single cent. It was competent for the parties to agree that he should receive interest at the legal rate on the interest so due, and an agreement to receive more than the legal rates on such interest forfeits only the excess above six per cent. Again, it was perfectly competent for them to agree that the taxes which had been paid by Banks on this mortgage should be refunded to him with legal interest thereon from the time they were paid. A stipulation in the mortgage that the taxes on the mortgage debt should be paid by the mortgagor would not have been usurious, nor will an agreement to repay the money that the mortgagee may have paid for such taxes with legal interest thereon be subject to the imputation of usury. All that the plea of usury, under the present law of the State, does, is to purge the contract of excessive interest, and this was all that a party could do, under former laws, when he went into a Court of Equity as complainant, seeking relief against a contract on the ground of usury. The accounts, therefore, are wrong in striking out the interest on the interest at the legal rate and the amount paid for taxes on the mortgage debt with legal interest thereon. *Fitzhugh vs. McPherson*, 3 *Gill*, 408. *Gwynn vs. Lee*, 9 *Gill*, 137. *Baugher vs. Nelson*, 1 *Md. Ch. Dec.*, 299. *Bandell vs. Isaac*, 13 *Md. Rep.*, 202. *Robertson vs. Homestead Association*, 10 *Md. Rep.*, 397. *Jordan vs. Trumbo*, 6 *G. & J.*, 203.

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That the assignment from William W. McClellan to the appellee, Eliza McClellan, gives her no standing in a Court of Equity upon which she can maintain this suit. Because said assignment was not *bona fide* under the Act of 1829, chap. 51, and was in itself inequitable and against the policy of the law. *Powles vs. Dilley*, 2 *Md. Ch. Dec.*, 153. *Glenn vs. Randall, Id.*, 222, 223.

Because the assignment, even if valid, assigns to her nothing which gives her a right to make the claims and set up the defences relied on in the bill. *Dakin & Pomeroy vs. Kraft*, 9 *Gill*, 6. *Gordon vs. Downey*, 1 *Gill*, 41. *Dewolff vs. Johnson*, 10 *Wheaton*, 368. *Trumbo vs. Blizzard*, 6 *G. & J.*, 18. Act of Assembly, 1829, chap. 51. Act of Assembly 1845, ch. 352.

Equity will not relieve or assist in enforcing the payments of a penalty or forfeiture. 2 *Md. Ch. Dec.*, 510.

A. W. Machen for appellee.

It is submitted on behalf of the appellee that there is no error in the decree.

1. It is a perfectly well settled doctrine of equity that it is competent to show by parole evidence that a conveyance, absolute on its face, was intended at the time to operate as a mortgage. If fraud or mistake are averred—as here—the admissibility of the evidence does not admit of question. *Thompson vs. Banks*, 2 *Md. Ch. Dec.*, 430. *Dougherty vs. McColgan*, 6 *G. & J.*, 281. *Babcock vs. Wyman*, 19 *How.*, 289. *Russell vs. Southard*, 12 *How.*, 147. *Morris vs. Nixon*, 1 *How.*, 118. *Bank of Westminster vs. Whyte*, 3 *Md. Ch. Dec.*, 508. *Hughes vs. Edwards*, 9 *Wheat*, 495. *Wesley vs. Thomas*, 6 *H. & J.*, 27. 2 *White and Tudor, Le. Ca.*, 877, *and Amer. Note. Adams. Eq.*, 111.

That the assignment of the Bank Lane ground rent

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was meant as a security for a loan is proved by the testimony of W. W. McClellan, but is also indicated by all the surrounding circumstances. It cannot be controverted that Mr. McClellan's immediate object was to raise money. This being so, none but an idiot (which it is not pretended that he was) would make an exchange of a marketable commodity immediately and certainly convertible into $1,600 or upwards for another which was heavy at $1,350. That a loan was intended is also shown by the mortgage contemporaneously acknowledged. Mr. Banks himself is compelled to admit that the McClellans came to him for a loan, and he fails utterly to show the motive by which he prevailed upon them to sell to him a ground rent for which anybody else would readily give $1,600 or $1,700 for gas stock of which the par value was but $1,500, while it would bring in the market only $1,350. That Mr. Banks' repugnance to the relation of lender was not invincible is shown by all the subsequent transactions between the parties.

2. No valid objection can be urged to the testimony of W. W. McClellan. *National Fire Insurance Co. vs. Crane*, 16 *Md. Rep.*, 294. *Reynolds vs. Manning*, 15 *Md. Rep.*, 510. *Pegg vs. Warford*, 7 *Md. Rep.*, 582.

3. As between borrower and lender, and under such circumstances as are found in this case, there had been no such lapse of time as could shelter the appellant from inquiry. Indeed, with the exception of the Bank Lane annuity, all the transactions in question are so interwoven with one another that the investigation of what is justly due under the last mortgage necessarily involves the unravelling of the whole web of usury.

But if laches or the statute of limitations could ever have been set up, the appellant is precluded from such defences by the agreement under which his answer was filed. *See also Trumbo vs. Blizzard*, 6 *G. & J.*, 23. *Dix vs. Van Wyck*, 7 *Hill*, 522, 525. *Cole vs. Savage*, 10 *Paige*,

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583, 591. *Morris vs. Floyd*, 5 *Barb.*, 136. *See Scrivner vs. Scrivner*, 1 *H. & J.*, 743, in answer to appellant's 4th point.

On the construction of the Act of 1845, chap. 352. *See Baugher vs. Nelson*, 9 *Gill*, 299. *Wilson vs. Hardesty*, 1 *Md. Ch. Dec.*, 66, 69. *Gibbs vs. Cunningham*, 1 *Md. Ch. Dec.*, 45.

In answer to the counsel of the appellant the appellee's counsel argued:

That the act of 1829, chap 51, has no operation where the question is upon the enforcement of an equitable right in a Court of Equity. The Act was remedial, not restrictive. *Crawford vs. Brooke*, 4 *Gill*, 222. It is plain that the assignment passed all W. W. McClellan's equitable and real interest in the claim and subject matter to the complainant. But for such parting with all right and claim by the assignor, he would remain interested and incompetent to testify, which it is conceded he is not. *Pegg vs. Warford*, 7 *Md. Rep.*, 582. *Reynolds vs. Manning*, 15 *Md. Rep.*, 526. Not only is Eliza A. McClellan properly complainant, but she is the only person who could be complainant. William W. McClellan could not even be made party defendant. *Hoye vs. Johnston*, 2 *Gill*, 291. Secondly, *Crawford vs Brooke*, 4 *Gill*, 213, merely decided that the circumstance that the assignment was made for the purpose of enabling the assignor to testify was competent evidence to go to the jury as tending to show want of *bona fides* under the Act—not that it was conclusive: all in the opinion of the Court that went beyond this, (relating to the second exception in that case,) was *dictum*. Where the right to reject the usurious part of the interest has not been waived by the assignor it passes to his assignee. *Trumbo vs. Blizzard*, 6 *G. & J.*, 23. *Lloyd vs. Scott*, 4 *Pet.* *Dix vs. Van Wyck*, 2 *Hill*, 522, 525. *Cole vs. Savage*, 10 *Paige*, 583, 591. *Morris vs. Floyd*, 5 *Barb.*, 136. The

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position of the debtor or his assignee, when complainant, is not altered by the Act of 1845, chap. 352, which was merely remedial. *Baugher vs. Nelson*, 9 *Gill*, 299, 307, 308. *Wilson vs. Hardesty*, 1 *Md. Ch.*, 66, 69.

WEISEL, J., delivered the opinion of this Court.

The complainant, Eliza A. McClellan, the appellee in this Court, claims as assignee of her brother, William W. McClellan.

The subject matters of the assignment are:

1st. All the claim, interest and benefit of the assignor in the sum of thirty-three hundred dollars in Baltimore City stock, deposited with Messrs. Brown and Brune, attorneys of Henry V. Ward, to whom the assignor sold certain real estate in Baltimore, on the corner of Baltimore and Charles streets, on which Banks, the appellant, held a mortgage, and claimed an amount, which was disputed; the said stock for $3,300 being withheld by Ward, the purchaser, to abide the determination of said dispute, and the assignee undertaking to satisfy the said claim of the mortgage as it may be legally or equitably determined.

2nd. All the claim of the assignor against said Banks for or on account of the value of a yearly rent of one hundred dollars, conveyed by him and wife to said Banks by deed of the 28th of May, 1841, and all the agreements between them concerning said rent, and relating to the claim or right of the grantors to have the same reconveyed to him, the said McClellan, upon his paying a certain sum for so much in value lent to him by Banks, for which said conveyance was meant only as a security. This property is on Bank lane, in said city, and particularly described in the deed of said McClellan and wife to said Banks, exhibited with the bill and marked Exhibit E, No. 2.

3rd. All the right, title, claim, interest and estate, legal and equitable, of the assignor, in and to, and all his right

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under an agreement with said Banks for a reconveyance and release of the rent and reversion of a piece of ground in said city, on Baltimore street, near Green street, leased by said Banks to John T. Purcell, and to and in the rent reserved on said lease, and the reversion of and in the ground; the said assignee (the complainant) to satisfy said Banks the debt due to him for which said property was originally mortgaged by Catharine McClellan.

The consideration of this assignment, besides the undertakings by said Eliza to pay said mortgage claims, was a conveyance by her to said William of certain leasehold property in the city of Baltimore, executed a short time before said assignment to her, viz: on the 9th of June, 1859, and the said assignment was made without any recourse whatever to said William W. McClellan, his heirs, executors or administrators.

The Record contains written evidence that the property out of which the lease to Purcell was carved, and also the reversion in the portion covered by that lease, (which is the third subject matter of the assignment,) were to be reconveyed to William W. McClellan, upon payment of the money and interest thereon, to secure which said property was originally mortgaged by Catharine M. McClellan. The appellee, as assignee of the equity of redemption, is entitled to the aid of a Court of Chancery to redeem said property by paying the mortgage debt and simple interest thereon, or by bringing the same into Court to be paid to the said Banks. This she proffers in the bill to do, and prays for its reconveyance to her.

In order to extricate the $3,300 city stock held on deposit by Messrs. Brown & Brune, to indemnify Ward, the appellee undertakes by the bill to litigate with Banks touching the amount due him on his mortgage on the property at the corner of Baltimore and Charles streets. As by the terms of the assignment to her, and as part of

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its consideration, she engaged to pay whatever might be found due on that mortgage, we think she can maintain her position in a Court of Equity for this purpose. That claim is a lien upon the city stock assigned to her, and its true amount was a matter of controversy. She alleges that the consideration of the mortgage was usurious, and that the sum claimed by Banks should be purged of the usury and thereby largely reduced, as well as by deductions for certain charges for taxes, for which the mortgagor was not bound. To reduce it still further, she claims an account touching the transaction which forms the second subject matter of the assignment to her, the conveyance of the property on Bank lane, which, it is alleged in the bill, was intended as a mortgage between her brother and Banks, but which the latter, in fraud of his agreement, insisted on treating as an absolute conveyance, and afterwards sold and conveyed the property to a third party.

The consideration of these questions involves the exceptions by the defendant below to the competency of William W. McClellan as a witness, and the admissibility of his proof; and also the objection urged in the argument to the ability of the complainant to maintain this suit in her own name as assignee of these subjects of contest.

We regard William W. McClellan as divested of all interest in the subjects in controversy, by the assignment to his sister and its terms, and therefore competent to be a witness for her, on the authority of *Crawford vs. Brooke*, 4 *Gill*, 217. *Pegg vs. Warford*, 7 *Md. Rep.*, 603. *Reynolds vs. Manning*, 15 *Md. Rep.*, 518, 522. *Nat. Fire Ins. Co. vs. Crane*, 16 *Md. Rep.*, 294.

We also regard these matters of the assignment as not unmixed choses in action for the payment of money, and therefore as not embraced within the terms of the Act of 1829, ch. 51. See *Gordon vs. Downey*, 1 *Gill*, 41. *Crawford vs. Brooke*, 4 *Gill*, 221, 222.

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As assignee of the mortgagor's rights in reference to the ground rent and reversion in fee in the property on Bank lane, if the transaction in relation to it between her brother and Banks was intended merely as a security for a loan, the appellee can resort to a Court of Equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property upon payment of the amount properly due, (or if the property has passed beyond her reach, and the mortgage be overpaid,) ordering an account and repayment of the difference.

Much of the controversy in this case relates to this transaction, which originated in 1841, more than eighteen years before the filing of the bill. Mr. McClellan is sufficiently distinct in stating that it was understood and agreed between himself and Banks, that the Gas Company stock received by the former was but a loan, and not a purchase, and the conveyance of the ground rent to the latter, absolute on its face, was to be regarded only as a security, and the only corroborating circumstance stated by the witness is that at the end of three years Banks, being applied to, consented that the loan might continue. But to the mind of the Court all the other circumstances militate against the idea of a loan and security. The length of time, (which may be regarded among the probabilities to be taken into consideration with the proof, although by agreement it was not to be relied upon as a defence,) the various subsequent accounts between the parties, when no reference was made to any claim on this account; the fact that the property was the estate of Mrs. McClellan, who joined her husband in the conveyance, and to whom, and not her husband, the reconveyance, if agreed upon, should have been stipulated to be made; and that no notice whatever was taken of this claim by McClellan in 1858, when he tendered to Banks the sum of $2,300 in full satisfaction, and demanded a reconveyance of the Purcell property, and

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a release of the mortgage of the 6th May, 1850, without any demand for a reconveyance of the Bank lane property, or any repayments on that account, are sufficient to satisfy the Court that whatever may have been the understandings originally between the parties, McClellan acquiesced in the absolute nature of the transaction, and waived all further claims to this property. We therefore think that the appellee is not entitled to an account of and concerning the matter and moneys alleged in reference to this branch of the assignment to her, and that the conveyance to Banks by William W. McClellan and wife of the 28th of May, 1841, being "Exhibit E, No. 2," with the bill of complaint, should be held and treated, as it is upon its face, an absolute deed of conveyance.

It is proved that the consideration of the mortgage of May 6, 1850, for $1,288.60, was usurious. Money due for interest, may by agreement be changed into principal to bear interest *in future*, but not otherwise. In this case interest was not only calculated on interest for several years in arrear, but the amount so added was doubled. We consider that the charges for taxes on the mortgage, with simple interest on each item from the time it was paid, are allowable, Mr. McClellan having agreed to pay them, and the law authorizing such payments without incurring usury. The statement of "Exhibit E, No. 7," by striking out the item of $6.45, second charge, being interest on interest, and adding in lieu of it interest at the rate of six per cent. on $1,000 from 8th January, 1850, to 6th May, 1850, and also adding the tax items in "Exhibit E, No. 6," with legal interest on each from the time when they were respectively paid to May 6, 1850, would present the proper sum as the consideration of that mortgage; and that sum, with six per cent. interest on it from the date of

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said mortgage, May 6, 1850, to the present time, would show the amount due upon it.

The assignee, standing in legal privity with Wm. W. McClellan, can avoid the contract for the excess of usury, (*Dix vs. Van Wyck*, 2 *Hill*, 522,) and is entitled to the proper reduction on this mortgage, that the true lien on the $3,300 city stock, assigned to her, may be thus ascertained and determined, to enable her to perform her part of the contract with her brother in this respect, and by her payment of which to relieve the mortgaged premises from the incumbrance in favor of Ward, the purchaser.

It follows from these views, that the exceptions to all the audits should have been sustained; and that the amount on both outstanding mortgages, which the assignee undertook to discharge, should be ascertained by the auditor conformably to this opinion, and that the decree should direct a reconveyance of the one to the appellee, and the release of the other to Ward, upon her paying the amounts, or bringing the same into Court, to be paid to the appellant; and we are further of opinion that each party should pay his respective costs in both Courts.

The decree below will be reversed, and the cause remanded, with instructions for an audit, or audits, and a decree conformably to the views expressed in this opinion.

Decree reversed and cause remanded,
each party to pay his own costs in both Courts.

(Decided February 28th, 1866.)

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STATE OF MARYLAND USE OF MARY COUGHLAN *vs.* BALTIMORE & OHIO RAIL ROAD COMPANY, AND BALTIMORE & OHIO RAIL ROAD COMPANY *vs.* STATE OF MARYLAND USE OF MARY COUGHLAN.

RAIL ROAD COMPANIES, LIABILITIES OF: 1 CODE, ART. 65, SECS. 1 AND 2: EVIDENCE: PLAINTIFF MUST NOT HAVE CONTRIBUTED TO THE INJURY BY HIS OWN NEGLIGENCE: PRAYERS AND INSTRUCTIONS TO THE JURY: MEASURE OF DAMAGES: PARENT AND CHILD.

The Baltimore & Ohio Rail Road Company were the owners of a track on Locust Point, Baltimore, and used a locomotive for moving and arranging trains thereon. On the occasion in question, a train consisting of many cars was being backed by a locomotive at a slow speed around a curve, near which were houses which prevented the engineman from seeing the rear-most car upon which two boys had climbed and were riding, holding by the bumper, with their feet upon the brake-bar. A sudden jolt threw them upon the road, when the cars passed over them, killing one and maiming the other. The mother of the child thus killed, brought an action for damages against the Rail Road Company under Article 65, Sections 1 and 2 of the Code. It was in evidence that both boys had been driven from similar trains on former occasions, and complaint made to their parents. It was admitted that there was no employee of the company on the rear end of the hindmost car, or walking in advance of it, while moving backwards, and that the engineman and conductor knew nothing of the accident until some time after it had happened, HELD:

1st. That the liability of the defendants in this case did not depend upon their obligations as carriers of passengers, in which character they are bound "to use the utmost care and diligence which human foresight can use," but their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect or default, "as would (if death had not occurred) have entitled the party injured to maintain an action and recover damages in respect thereof."

2nd. That the party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the law requires toward those with whom there is a relation of trust and confidence, or bailment between the parties.

3rd. That if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although by the exercise of extraordinary care on their part the accident might have been prevented.

4th. That in actions for injuries resulting in death, the plaintiff must show that neither the party injured, nor the parties for whose use the action

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was brought, had contributed by neglect or want of care to the calamity complained of.

5th. That where an omission in an instruction given enures to the advantage of the appellant, advantage cannot be taken of the same on his appeal.

6th. That the law entitles the mother to the services of her child during his minority only, (the father being dead,) beyond this, the chances of survivorship, his ability or willingness to support her, and the mental suffering of the mother, resulting from the death of her child, are matters too vague to enter into an estimate of damages merely compensatory.

CROSS APPEALS from the Superior Court of Baltimore City.

The action in this case was brought in the name of the State to the use of Mary Coughlan against the Baltimore and Ohio Rail Road Company, to the September Term, 1861, of the Superior Court of Baltimore City, to recover damages for the killing of her child, Peter Bannon.

The declaration alleges that the said Peter was wounded and injured on the 13th of October, 1860, by the wrongful act, neglect or default of the said Company's agents while engaged by the authority and direction of the said Company in the management and use of their railway, &c., in such a manner that he afterwards, on the same day, of the said wounds and injuries, died.

The bill of particulars filed in the case state, that about four and a half o'clock, P. M., on the 13th of October, 1860, while a train of cars belonging to the said Company were upon the railway at Locust Point, they were suddenly, without any brakesman or other person having previously gone back to see that the track was clear, and without sufficient warning or intimation to the people residing in the neighborhood of and along said railway, put in motion and backed around a short curve, by which means, Peter Bannon, a child, about ten and a half years old, the son of Mary Coughlan, the party for whose

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use this suit was brought, was run over and killed, the wheels of the cars of said train passing over and horribly crushing and mangling his head, so that he died of the wounds so received on the said 13th of October, 1860; and that there was negligence on the part of those having the management of said train of cars from which negligence the said death resulted, and that the damages claimed are $10,000. The defendants pleaded "Not Guilty."

Exception.—The plaintiff to maintain the issue on its part joined, proved by *Newcomer*, a police officer of Baltimore city, that his beat was at Locust Point, in said city, on the 13th October, in the year 1860; that he knew the plaintiff's *cestui que use* and her children, the eldest of whom was named Peter, a likely lad, small, of twelve years of age apparently, and who attended to his mother's business when she was absent; that Mrs. Coughlan lived at the corner of Towson and Marriott streets, where she kept a grocery; that there was what is called a Y in the rail road track where the road comes along Nicholson street, and at or near Towson street it follows a semi-circle until it reaches Marriott street, up which it passes close by Mrs. Coughlan's house and store; that Marriott street is not paved or used as a carriage road, and the rail road passes through a cut between Towson street and Haubert street; that the next street to Towson street is Cooksie street; that there are houses on Towson street, and a number of them within the Y, which would prevent an engineman at the corner of Nicholson and Towson streets from seeing the end of the train if it extended past Mrs. Coughlan's up Marriott street; that the witness knew that the defendants' cars were often left standing across Towson street, and that he had notified the agents that it was improper, and that they must remove them; that there was a school house, and beyond that a spring, to reach which, from Mrs. Coughlan's, and the other houses within the Y, it

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was necessary to cross Marriott street; that hearing that an accident had happened on the 13th of October aforesaid, he went to the spot, which was near the intersection of Cooksie and Marriott streets, and saw where a person had been run over by the cars, and dragged apparently some thirty or forty yards. He afterwards saw the body, which was Mrs. Coughlan's eldest son, Peter, the brother of whom had been injured at the same time.

The plaintiff further proved by *Mrs. Jennings*, a competent witness, that Peter, the boy that was killed, was a slight made boy, small and cunning like, and apparently between ten and twelve years of age, who rendered to his mother the services of a boy of his age, taking care of the store when she went away.

George Wright, proved that after the accident he helped to cut loose and shove the cars back, so as to extricate the body, and that it was fifteen or twenty minutes before any of the hands of the defendants came to the place.

Slothower, a competent witness, produced on the part of the plaintiff, proved as follows: He was on his way from the brick yards, and saw Mrs. Coughlan's boys playing on the track—he heard the cars. The cars first moved slowly, and then faster. One got on the car, and one boy was getting on it. The train was being backed, and the boys were in front of the last car, and about twenty yards from witness; they were hanging on behind the cars when one fell. Witness began to cry out to the engineer—one boy was hanging on to the cars at the time. There was no agent or employee on the back of the train, or near it, that witness saw, when the accident happened.

Several other witnesses were offered by the plaintiff, who proved the character of the boy, and the circumstances of the extrication of the body, none of whom, however, saw the

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accident; and the plaintiff further offered evidence to show that the services of such a lad as the deceased to his mother were worth from $5.00 to $6.00 per month, and that the place where the accident occurred was the most populous portion of that part of the city.

The defendants, to support the issue on their part, offered evidence by *Henry Linn*, a competent witness, that he saw the accident as he was crossing the common from his work; that the children were playing on the common above the rail road track when the end of the train which was being backed came round the curve; that three or four minutes before the cars stopped, he saw the children run towards them, and the eldest, the deceased, get on the hindmost one when the train was still in motion, catching the bumper with his hands, and putting his feet on the brake-rod below; that he then saw the big boy (Peter) fall off, with his head across the track, and he was killed. On cross-examination, this witness stated as follows: He was with two companions at the time, and when he saw the cars, he proposed to them to take a ride on them, but they objected and they did not go—witness had often done the same thing before. When witness proposed to get on the train, he was near enough for Mrs. Coughlan's sons to have heard what he said, but he cannot swear that they heard him or did not hear him. At the time of the accident, witness saw no agent or employee of the defendants at the end of the train, or near it, or in the neighborhood of it.

The defendants further proved by —— *Sticker*, teamster of the defendants at Locust Point, that he knew the deceased, and had often driven him and other children from the cars, and warned them of the danger they ran of being killed or crippled, and told the mother of Peter of the conduct of her children, when she said she had tried to keep them off, but could not; and the defendants proved a like notice

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to the children of Mrs. Coughlan and others, at various times, by —— *Kelso*, the watchman at Locust Point, in the service of the defendants, by *Jacob Parker*, the brakesman on the train that caused the accident, and by *Ennes Toby*, the conductor of the train; also by —— *Shier*, one of the defendants' employees.

The defendants further proved by *Robert McManus*, that he was the engineer of the engine No. 60 that was backing this particular train at the time of the accident; that it was a regulating engine, whose business was to collect together the cars from the adjacent wharves and tracks, and unite them into a train to be taken off by another engine; that on this occasion he had collected forty-four or forty-six cars, and had backed them until they lapped round the Y, and that he had still four or six cars to add to make up the desired number; that he had backed the train from time to time, and when he added the last cars, he backed it again at a very slow speed, for it was as much as the engine could do to move it, the grade on Marriott street, up which it extended, being up hill; that he blew his whistle three times before he began to back it, which is the rail road signal to its employees for backing, and he was confident he so blew it on this occasion; that he could not see the end of the train from where he stood on his engine; and that he was not aware of the accident, and did not become aware of it for half an hour afterwards.

On the cross-examination of *Jacob Parker*, above named, he said that it was his business to attend to the cutting loose and attaching of the train as it was being made up, and applying the brakes; that he was so engaged on this occasion not far from the engine; that he knew the whistle was blown, having been led by circumstances to recollect it on the evening of the day of the accident, but that he did not know that the accident had happened until half

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an hour afterwards; that he did not go to the rear of the train before it was moved backwards, and that it was not his practice to do so. In their examination in chief, both *McManus* and *Parker* testified to the fact that the train was moving very slowly at the time.

On cross-examination of *Ennes Toby*, the conductor, he stated that he did not go to the rear of the train; that he could not see it from where he was at the time of the accident; that his business was to attend to making up the train and to give notice to the engineman how far to back his engine; that there was no one on the rear car or at the rear of the train at the time; that had he been at the corner of Towson and Marriott streets he could have seen the end of the train and the engineman too; that sometimes he did go there to look out; that on this occasion the train was moving so slowly, the engine having as much as she could do to push the train at all up the grade of Marriott street, that any one who had seen it coming might have got out of the way; that in his judgment he was at the time using the greatest care, but that since he has used somewhat more care.

This witness, on his examination in chief, in speaking of the notice to the children and the mother, said that the mother had whipped her children for getting on the cars; that he had seen the children on the cars when in motion, and driven them off. It was proved by the production of the family record that the age of the deceased was ten years, eight months and three days.

The plaintiff thereupon prayed the Court to instruct the jury as follows:

1st. That if, from the evidence, the jury believe that the Baltimore and Ohio Rail Road Company are the owners of a rail road track or tracks, and of certain cars and engines used thereon, at Locust Point, in the city of Baltimore, along which track or tracks said cars and

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engines were drawn or propelled for the purposes and in and about the business of said rail road company, then in the movement, use and management of said cars and engines, the said company is bound to exercise the utmost care and diligence to prevent accidents endangering the life or lives of the people or inhabitants of said city.

2nd. That if the jury shall believe from the evidence that the said rail road company were at the time of the accident complained of, the owners of a rail road track or tracks, and of certain cars and engines used thereon, at Locust Point, along which track or tracks said cars and engines were drawn or propelled for the purposes of said company, then, for the purpose of preventing accidents endangering human life, the said company were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and that if the use of a guard or look-out at the head or in the rear of said cars when the said company was engaged in making up its train or trains, if the jury shall find they were so engaged, was a measure by which such accidents would probably be avoided, the omission to use such guards or lookouts at the head and rear of said cars or trains, if proved to the jury, was culpable negligence; and it is for the jury to say whether to this negligence the fatal accident, (if the jury shall find such fatal accident,) which has given rise to this action might not justly be imputed.

3rd. That if the jury believe from the evidence that the plaintiff is entitled to recover upon the ground set forth in the second prayer above, they will, in their estimate of damages, take into consideration the expense to which the plaintiff was subjected in consequence of the accident and the loss resulting therefrom, not only to the present time, but also the probable prospective loss and expense incurred by the plaintiff in consequence of said accident, and that

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in estimating the said loss and damages the jury are not limited to the actual pecuniary loss proved in the case.

And the defendants prayed the Court to instruct the jury as follows:

1st. The defendants, by their counsel, prayed the Court to instruct the jury that if they find from the evidence that the child of the plaintiff, *cestui que use*, spoken of by the witnesses, was run over and killed by the cars of the defendants, and that the place where the accident took place, although marked as a street on the plat of the city, if the jury shall find that fact, was not opened or used as such, and was not a thoroughfare used by the public or persons residing in the neighborhood, but was occupied by the track of the defendants' road only, and that the said child was not at the time of the accident using it as a thoroughfare or crossing the same, and that at the time of the accident the said cars were moving at a speed which would have permitted either an adult or a child to have avoided them, even had such person been using the said street as a thoroughfare, or crossing the same, if he had used such diligence as was reasonably to have been expected from him, then the plaintiff is not entitled to recover.

2nd. The defendants, by their counsel, prayed the Court to instruct the jury that if they shall find from the evidence that the child of the plaintiff, *cestui que use*, spoken of by the witnesses, was run over and killed by the cars of the defendants, and that the said child was of sufficient intelligence to take charge of and attend to the business of said *cestui que use* in her absence from her store, and that he did so take charge of and attend to it, and that just before the happening of the accident he was playing outside of the road of the defendants where the accident happened, and in a place of safety, so far as the defendants' cars were concerned, and that seeing the said cars in motion he ran toward them and jumped upon the leading car, as de-

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scribed by the witness Linn, and was riding there when he was jolted off or fell off, and was killed as described by the witnesses, then the plaintiff is not entitled to recover, even though the jury shall believe that the defendants did not use the care and diligence that would have prevented the child from getting upon the cars as aforesaid.

3rd. The defendants, by their counsel, prayed the Court to instruct the jury that if they shall find from the evidence that the child of the plaintiff, *cestui que use*, spoken of by the witnesses was run over and killed by the cars of the defendants, and that the said child just before the happening of the accident was playing in a place of safety, so far as said cars were concerned, and that seeing the said cars in motion he ran towards them and jumped upon them, as described by the witness Linn, and was riding there when he was jolted off or fell off, and was killed as described by the witnesses, and that the said child had been warned previously not to get upon the said cars as he might be crippled or killed, and had been driven from off them on previous occasions, and that he was of an age to understand such warning and the risk he run, then the plaintiff is not entitled to recover, even though the jury shall believe that the defendants did not use the care and diligence that would have prevented the said child from getting upon the cars aforesaid.

4th. The defendants, by their counsel, &c., prayed the Court to instruct the jury that even if the jury shall find from the evidence that at the time of the happening of the accident spoken of by the witnesses, the defendants were not complying with the regulations of the ordinance offered in evidence by the plaintiff in regard to the use of locomotive engines within the limits of the city of Baltimore, yet the plaintiff is not on that account entitled to recover. If the jury shall believe from the evidence that the conduct of the child of the plaintiff, *cestui que use* was

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the immediate cause of the accident, and that his death was the result of a want on his part of that degree of care which the jury may believe was under all the circumstances naturally and reasonably to be expected in one of the said child's age and intelligence.

5th. The defendants, by their counsel, prayed the Court to instruct the jury that in assessing damages they are confined to those for which a pecuniary estimate can be made, independent of the mental pain and suffering of the *cestui que use*, and that they are to take into consideration the probabilities of life, as well as other circumstances. Which instructions of both plaintiff and defendants the Court (MARTIN, J.) rejected, but instructed the jury as follows:

I instruct the jury—

1st. That if the jury find from the evidence that the Baltimore and Ohio Rail Road Company are the owners of the rail road track or tracks, and of certain cars and engines used thereon, at Locust Point, in the city of Baltimore, along which track or tracks said cars and engines were drawn or propelled, for the purposes and about the business of the said rail road company, then in the movement, use and management of said cars and engines, the said company is bound to exercise the utmost care and diligence which it was within their means and power to employ to prevent accidents endangering the life or lives of the people and inhabitants of said city; and if the jury find that the child of the plaintiff's *cestui que use* was run over and killed by the defendants' cars, as described by the witnesses, and that if the defendants, in the use and management of their cars and engines had exercised the highest degree of care and diligence, which it was within their means and power to employ, the said accident could have been prevented, then the plaintiff is entitled to recover in this action; but although the jury may find that the said

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accident could have been prevented by the use of such care and diligence on the part of the defendants, yet the plaintiff is not entitled to recover if the jury believe the accident could have been avoided by the exercise of that degree of care by the said child, which was, under all the circumstances, to be naturally and reasonably expected from one of the said boy's age and intelligence.

2nd. That if the jury find, under the first instruction, a verdict for the plaintiff, that in assessing the damages they are not to take into consideration the mental pain and suffering of the plaintiff's *cestui que use* in consequence of the death of the child, and are not to give against the defendants punitive, vindictive or exemplary damages, but in estimating the damages they are confined to the pecuniary damage sustained by the plaintiff, and are to give to her such a sum as the jury may believe, from all the evidence in the case, will be an adequate compensation for the loss of her son's services from the time of his death to the period when, if he had lived, he would have attained the age of twenty-one years.

To the action of the Court in rejecting their prayers and granting the instructions given as aforesaid, the plaintiff and defendants excepted and brought up these appeals.

A. S. Ridgely and *Robert J. Brent* for the appellant.

I. The first instruction of the Court below precludes a recovery "if the jury believe the accident could have been avoided by the exercise of that degree of care by the child, which was under all the circumstances to be naturally and reasonably expected from one of the said child's age and intelligence." The rule that non-suits the surviving relative, if the deceased's own negligence contributed to the injury, is admitted. *Redfield on Railways*, 337. *Tucker vs. Chaplin*, 2 *Car. & K.*, 730.

This action is founded on statute. 1 Code, Art. 65, secs. 1 and 2.

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The Code is in terms similar to the English Act known as Lord Denman's Act. *Redfield on Railways*, 336, 337. *Pierce on Railways*, 257.

By this a remedy is provided for certain relatives of the deceased, only in cases where, if the injury had not proved fatal, he would himself have had a right of action against the party inflicting the injury. *Pierce on Railways*, 262. 1 Md. Code, sec. 1, p. 449.

It is a cardinal rule of interpretation that statutes are to be construed in reference to the principles of the common law, for it is not presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the Act was not designed to make any alteration other than what is specified, or besides what has been plainly pronounced. *Dwarris on St.*, 675. *Keech vs. B. & O. R. R. Co.*, 17 *Md. Rep.*, 45.

At common law a plaintiff cannot recover for injuries to which his own fault or negligence directly contributed. *Redfield on Railways*, 837. 2 *Car. & R.*, 730. 17 *Md. Rep.*, 45. *B. & O. R. R. Co. vs. Lamborn*, 12 *Md. Rep.*, 261. *Lygo vs. Newbold*, 9 *Ex.*, 303, 306. *Irving vs. Sprigg*, 6 *Gill*, 200. *Edwards vs. Balt. F. Ins. Co.*, 3 *Gill*, 176. And this negligence is understood to be a want of ordinary care, such as men of common prudence use under like circumstances. *Pierce on Railways*, 272, 274. *Lygo vs. Newbold*, 9 *Ex.*, 306.

But this interpretation of the negligence here spoken of is received with qualification in cases of children and disabled persons. In such cases it has been considered that the want of ordinary care required of the plaintiff is only such as his capacity admits of, or such as may reasonably be expected of him. *Pierce on Railways*, 278. *Redfield on Railways*, 330. *Lynch vs. Nurdin*, 1 *Q. B.*, 29, (41 *E. C. L.*,) 422. *Lygo vs. Newbold*, 2 *Ex.*, 302. *Robinson*

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vs. Cone, 22 *Ver.*, 213. *Borge vs. Gardner*, 19 *Conn.*, 507. *Beers vs. Housatonic R. R.*, 19 *Conn.*, 566.

Instead, therefore, of instructing the jury that the plaintiff could not recover "if the jury believed the accident could have been avoided by the exercise of that degree of care by the said child, which was, under all the circumstances, to be naturally and reasonably expected from one of his age and intelligence," the Court should have told the jury that the plaintiff was not entitled to recover if the jury believed that on the occasion alluded to "there was a want of that degree of care on the part of said child, which, under the circumstances, was naturally and reasonably to be expected in one of his age and intelligence." The question of a want of or absence of such care should have been left to the jury, rather than the question of the exercise of such care. The instruction as given was calculated to mislead the jury. It was further calculated to mislead them, because it enabled them, in their caprice, to suppose that a very high degree of care was required on the part of the deceased. The question of negligence, the want of ordinary care, and not the degree of care to be exercised, should have been left to the jury.

II. The second instruction was designed to guide the jury in their assessment of damages, and we maintain that it was erroneous:

1st. Because it ignores the mental sufferings of the mother suing for the damages sustained by the loss of the child, and confines her claim to pecuniary damages. Whatever may be the English rule on this subject, we insist that according to the best considered cases in America, the mental anguish, which is the natural result of the injury, may be taken into account in estimating damages, though not of itself the fountain head of the action. *Redfield on Railways*, 337, *note* 3, 338, *and cases there cited. Canning vs. Williamstown*, 1 *Cush.*, 451. *Morse vs.*

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Aub. & Syr. Railway, 10 *Barb.*, 623. *Dickens vs. N. Y. Cen. R. R.*, 28 *Barbour*, 41, 43; and see the New York statutes in connection with this case. *Penn. R. R. Co. vs. McCloskey*, 23 *Pa. Rep.*, 528.

2nd. Because it limits the pecuniary loss of the mother, the *cestui que use*, to the minority of the child, and therefore deprives the jury of the right to award her damages for the pecuniary loss she would reasonably sustain in her advanced life for want of the labor and services of the deceased son, even after he reached his majority. The rule should have been to allow "what they considered a reasonable compensation." *Redfield on Railways*, 337, *note*, 2nd *Ed. Ainsworth vs. South E. R. R.*, 11 *Jurist*, 758. *V. & J. R. R. Co. vs. Patton*, 31 *Miss.*, (2 *Geo.*,) 156. *Kountz vs. Brown*, 16 *B. Monroe*, (*Ken.*,) 577. *Penn. R. R. Co. vs. Kelly*, 7 *Casey*, (31 *Penn.*,) 376. *Penn. R. R. Co. vs. Zebe*, 9 *Casey*, (33 *Penn.*,) 330. *Blake vs. M. R. R. Co.*, 10 *Eng. L. & E. Rep.*, 442.

We are not aware of any authorities which limit the mother's loss to the minority of her son. Such a principle would give no damages to an aged mother, whose only support was in the labor of an adult son, who is taken from her by the culpable negligence of a corporation.

Even the inexorable conscription Acts of Congress, under the exigent demands of war, spare such a son to his widowed mother; and unless there be some controlling adjudication, we submit that the ruling of the Court below was too narrow and limited to meet the approval of this tribunal.

John H. B. Latrobe, for the Baltimore and Ohio Rail Road Company, argued that the prayers offered on the part of the defendants below, and refused by the Court, should have been granted:

1st. As to the first prayer of the defendants:—because the rules applicable to the streets of a city are not appli-

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cable to a common, where streets exist but in a plat of the ground.

2nd. As to the second prayer of the defendants:—because the standard of intelligence suggested by the prayer, and asked to be given to the jury, was a proper standard.

3rd. As to the third prayer of the defendants:—because the facts stated in the prayer were proper to be considered by the jury, and sufficient to guide them. That the want of intelligence on the part of the child was supplied by actual warning.

4th. As to the fourth prayer of the defendants:—because the defendants were entitled to the benefit of the law there stated, and which, even though they were in fault, relieved the defendants, if the child, having sufficient intelligence, was a contributor to its own wrong.

5th. As to the fifth prayer of the defendants:—because the true rule of damages in like cases is that there laid down.

And they contend that the instructions of the Court were erroneous for want of those qualifications in favor of the defendants, to which they were entitled.

In support of these propositions, the following authorities were cited: *Ainsworth vs. Eastern R. R. Co.*, 11 *Jurist*, 758. *Gilbard vs. Lancashire R. R. Co. Chitty on Carriers*, 413. *Blake vs. R. R. Co.*, 83 *Eng. C. L. Rep.*, 93. *New York vs. Ransom*, 23 *How.*, 487.

Bowie, C. J., delivered the opinion of this Court.

These are cross appeals, in an action instituted under the 1st and 2nd Sections of Article 65, of the Code, by the State, for the use of a widowed mother, whose son was killed, under the circumstances detailed in the bill of exceptions.

After evidence offered by both parties, a series of prayers was submitted by each, all of which were rejected and others

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given by the Court instead thereof, to which rejection, and the instructions given, the plaintiff and defendants severally excepted.

The counsel of the defendants, having filed in these causes a declaration in writing, that in the event of an affirmance of the judgment as against the plaintiff on its appeal, in the first case, the defendants will abandon their exceptions, it is proper first to inquire whether the appellant has been aggrieved by the action of the Court below.

The General Assembly of this State, in the year 1852, finding the common law maxim, "Personal actions die with the person," unsuited to the circumstances and condition of the people, enacted a law entitled "An Act to compensate the families of persons killed by the wrongful act, neglect, or default of another person." To make its design more obvious, the fourth section provides "the word person shall apply to bodies politic and corporate," and "all corporations shall be responsible under this act, for the wrongful acts, neglect or default of all agents employed by them."

The material provisions of this Act, as well as its title, are derived from the 9th and 10th Victoria, and are embodied in Art. 65, (title Negligence) of the Code.

The object of the several series of prayers was, 1st, to furnish the jury with a standard of care and diligence, required by law, of the defendants, to exempt them from liability for damages, for the injury incurred; 2nd, to prescribe the care necessary to be exercised by the deceased, to entitle his next of kin to recover; 3rd, to define the measure of damages.

The appellant's first prayer required the defendants, under the circumstances therein predicated, "to exercise *the utmost care and diligence* to prevent accidents endanger-

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ing the life or lives of the people or inhabitants of the said city."

The second held that the defendants were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and if the use of a guard or lookout at the head or in the rear of said cars * * was a measure by which such accidents would probably be avoided, the omission was culpable negligence.

The appellant's third prayer affirms, that the jury in the estimate of damages should take into consideration, the expense to which the plaintiff was subjected in consequence of the accident, and the loss resulting therefrom not only to the present time, but also the probable prospective loss and expense, etc., and that in estimating the said loss and damage, the jury are not limited to the actual pecuniary loss proved in said case.

The propositions laid down by the Court, in the first instruction granted, are,

That the defendants in the movement and management of their cars and engines were bound to exercise the utmost care and diligence which it was within their means and power to employ to prevent accidents and injuring or endangering the life or lives of the people. And if the jury find that the child of the plaintiff's *cestui que use*, was run over and killed by the defendants' cars as described by the witnesses; "and that if the defendant's in the use and management of their cars and engines, had exercised the *highest degree of care and diligence*, 'which it was wthin their means and power to employ,' the said accident could have been prevented, then the plaintiff is entitled to recover in this action; but although the jury may find that the said accident could have been prevented by the use of such care and diligence, on the part of the defendants, yet the

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plaintiff is not entitled to recover if the jury believe the accident could have been avoided by the exercise of that degree of care by the said child which was under all the circumstances to be naturally and reasonably expected from one of said boy's age and intelligence."

The degree of care and diligence, imposed by law on the defendants, in the instruction given by the Court, is as high as that required by the appellant's prayers; the degree is, the "utmost care and diligence," the "highest it was within their means and power to employ;" the only material difference is, that one of the appellant's prayers asked the Court to instruct the jury specifically "that if the use of a guard or lookout, at the head or in the rear of said cars, was a measure by which such accidents would probably be avoided, the omission was culpable negligence." The general terms, used by the Court, embraced all the particulars specified by the prayer of the appellant, qualified by the words, "it was within their means and power to employ." The jury were at liberty to find under the instruction given, and perhaps did find that the absence of the guard constituted the want of "the highest care and diligence within the means and power of the defendants," and therefore rendered their verdict in favor of the plaintiff.

The liability of the defendants in this case, did not depend upon their obligations as carriers of passengers, in which character they are bound to use "the utmost care and diligence which human foresight can use." *Stockton vs. Frey*, 4 *G.*, 422, 423. *Worthington vs. Balto. & Ohio R. R.*, 21 *Md. Rep.*, 275. But their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect or default, "as would (if death had not ensued) have entitled the party injured to maintain an action and receive damages in respect thereof." Vide Code, Art. 65, Sec. 1.

The party injured not being a passenger, the defendants were not required to exercise that degree of vigilance,

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which the law requires towards those to whom there is a relation of trust and confidence or bailment between the parties. "Towards the one the liability of the latter springs from a contract express or implied, and upheld by an adequate consideration. Towards the other, he is under no obligation but that of justice and humanity. While engaged in their lawful business, both are bound to use a degree of caution suited to the exigencies of the case." 8 *Barbour*, 378.

In an analagous case, this Court said, rail road companies should use "such care and diligence in using the locomotive upon the road, as would be exercised by skillful, prudent and discreet persons having the control and management of the engine, regarding their duty to the company, the demands of the public and the interests of those having property, and having a proper desire to avoid injuring property along the road." This was said in a case of injury to property, but is cited with approbation by Redfield as applicable to persons. *Redfield on Railways*, 395. 4 *Md. Rep.*, 257.

The Court's instruction did not close with the definition of the degree of care and diligence on the part of defendants, but proceeded to inform the jury that although the accident could have been prevented by the exercise of such care and diligence by the defendants, yet the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of such care by the child as might under all the circumstances have been reasonably expected from one of his age and intelligence. In other words, if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although by the exercise of extraordinary care on their part the accident might have been prevented.

This ruling is in conformity with all the text writers,

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and the great majority of adjudged cases. *Redfield on Railways*, 337. 2 *C. & P.*, 730. 8 *C. B.*, 115.

It is objected on the part of the plaintiff below, the appellant in this case, that the Court's first instruction was erroneous, in instructing the jury the action could not be maintained, "if the jury believe the accident could have been avoided by the *exercise of that degree of care by the said child* which was, under all the circumstances to be naturally and reasonably expected from one of his age and intelligence;" whereas the Court should have told the jury, the plaintiff could not recover, if the jury found "there was a want of that degree of care on the part of the said child which under the circumstances, was naturally and reasonably to be expected in one of his age and intelligence." The question of the "*want of*," or "*absence of*" such care, should have been left to the jury rather than the exercise of such care. It is difficult, if not impossible, to perceive the difference between the two propositions. In the Court's instructions, the proposition is stated affirmatively; in the appellant's objection, it is negatively. The jury was to find whether there was or was not due care on the part of the deceased. They are told by the Court, if they believe the accident could have been avoided by "the *exercise* of that degree of care," etc., the plaintiff cannot recover. The appellant insists that it is not the exercise, but the want of care, (which is the non exercise of care,) that is the criterion. The principle of the common law, that a plaintiff cannot recover for injuries "to which his own negligence directly contributed," is admitted, and it seems to us, it was clearly expressed by the Court in the instruction given, as far as the conduct of the deceased child was concerned.

In the case of the *B. & O. R. R. Co. vs. Lamborn*, 12 *Md. Rep.*, 261, and *Keech's case*, 17 *Md. Rep.*, 46, the rule of the common law that the plaintiff could not recover for injuries to which his own negligence directly contributed, was held to

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apply to actions brought on the statutes therein referred to, and the instructions affirmed bythe Court in these cases submitted to the jury, the question of negligence on the part of the plaintiff, as well as on the part of the defendants.

The same policy would require the plaintiff to show in actions for injuries resulting in death, that neither the party injured nor the parties for whose use the action was brought, had contributed by neglect or want of care to the calamity complained of. This omission in the instruction given enured to the advantage of the appellant and cannot be taken advantage of on her appeal.

The objection raised by the plaintiff to the Court's second instruction, involves the measure of damages. In the language of the briefs, "it was erroneous, 1st. Because it ignores the mental sufferings of the mother suing for damages sustained by the loss of the child, and confines her claim to pecuniary damages. 2nd. Because it limits the pecuniary loss of the mother, the '*cestui que use*' to the minority of the child, and deprives the jury of the right to award her damages for the pecuniary loss she would reasonably sustain in her advanced life for want of the labor and services of the son, even after he reached his majority. The rule should have been to allow what they considered a reasonable compensation."

In the absence of any interpretation of this act by our own Courts, we must compare and weigh the reasoning of the authorities cited, in which similar acts have been construed by other tribunals. First in order are the decisions in England upon the Act called Ld. Denman's Act, 1 *Redfield*, 336. The observations of COLERIDGE, J., in the case of *Blake, administrator, vs. the Midland Railway*, 10 *Eng. L. & E. Rep.*, 467, cited by Redfield in his notes, are very strong in support of the instructions given by the Court below in this case, confining the jury to the pecuniary damage sustained by the plaintiff. He says, "our only safe course is

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to look at the language the legislature has employed. * * The title of the Act is for compensating families of persons, etc., not for solacing their wounded feelings." * * By the terms of the Act quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death, to his family." This language seems more appropriate to a loss of which some estimate may be made, than an "indefinite sum, independent of all pecuniary estimates, to soothe the feelings, and the decision of the amount strongly tends to the same conclusion." As we have before intimated, the title and language of the Act of Assembly of this State are almost literally the same with those of English statutes. The former contains also the provision for distributing the damages among the surviving members of deceased's family, on which the learned Judge relies, for adopting the principle of *compensation* for damages which may be estimated in money.

The American cases, arising upon Acts varying in language, necessarily lead, as observed by Judge REDFIELD, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words, by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors.

It is assumed by the learned author just mentioned, as the conclusion of the best considered cases in this country, "that mental anguish which is the natural result of the injury, may be taken into the estimate of the damages to the party injured, although not of itself the foundation of the action." The connection, in which this assumption is made, might lead to the inference, that it applied to actions brought by *survivors*, for injuries done to their deceased ancestor, relative or next of kin; but upon reference to the authorities cited, it will be found,

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"that the plaintiffs in those cases were the persons sustaining the bodily harm, and in estimating their damages, their mental suffering constituted an element of compensation." 1 *Cush. Rep.*, 451, and 10 *Barb.*, 623.

To have instructed the jury to allow "what they considered a reasonable compensation," would, in the language of the Supreme Court of Pennsylvania, "be giving the jury discretionary power without stint or limit, highly dangerous to the rights of the defendant, and leaving them without any rule whatever." *Rose vs. Story*, 1 *Barr Rep.*, 190, 197.

In the case of *The Penn. Rail Road vs. Kelly*, 7 *Casey*, 372, the same learned Court say: "Generally speaking (they add,) the influence of the Court in this class of cases, should be exerted to restrain those excesses into which juries are apt to run. * * * Wild verdicts are frequently rendered. And the tendency in modern times undoubtedly is to excessive damages, especially where they are to be assessed against corporations." *Ibid*, 379. 33 *Penn. Rep.*, 330. *The Penn. R. R. Co. vs. Zebe et ux.* The last objection to the second instruction granted is, that it limits the mother to compensation for the loss of her son during his minority only.

To submit to a jury the value of a life without limit as to years, would have been to leave them to speculate upon its duration, without any basis of calculation. The law entitles the mother to the services of her child during his minority only; (the father being dead,) beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory.

According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience and protection. Such pictures of filial

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piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.

This Court being of opinion that the several instructions granted by the Court below, were as favorable to the plaintiff (the appellant) as she was entitled to, and that she was not prejudiced by the rejection of the prayers submitted on her part, finds no error in the rulings of the Court below, in the first appeal, and will affirm the judgment.

Judgment affirmed.

(Decided February 28, 1866.)

PATRICK BANNON, BY HIS NEXT FRIEND JAMES COUGHLAN, *vs.* THE BALTIMORE AND OHIO RAIL ROAD COMPANY; AND THE BALTIMORE AND OHIO RAIL ROAD COMPANY *vs.* PATRICK BANNON, BY HIS NEXT FRIEND JAMES COUGHLAN.

RAIL ROAD COMPANIES, LIABILITIES OF: EVIDENCE, ADMISSIBILITY OF.—In an action against the Baltimore and Ohio Rail Road Company by the *prohcin ami* of a child, run over and badly injured by the cars of the company, after evidence of the injury, and for the purpose of showing negligence on the part of the company, the plaintiff proposed to prove that it was the daily practice of the defendants to move their cars without a guard at the rear of the train over the "Y," which was so situated that the engineer at the engine could not see the rear; which evidence the Court below rejected. On appeal, HELD:

That the evidence was collateral and incapable of affording any reasonable presumption or influence as to the matters in issue, and was properly excluded.

GROSS NEGLIGENCE: PRAYERS AND INSTRUCTIONS TO THE JURY: DAMAGES, PUNITIVE AND EXEMPLARY.—The facts enumerated on p. 84, (being substantially the same proved in this case,) are not evidence of *gross negligence*, such as would warrant an instruction to the jury; that if they should find

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such negligence on the part of the agents of the Rail Road Company, they might allow punitive or exemplary damages.

MEASURE OF DAMAGES, ELEMENTS OF.—In estimating damages under the evidence referred to, the jury should consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition in consequence of the said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those mechanical employments and pursuits for which, in the absence of the said injury, he would have been qualified; and also the physical and mental suffering to which he was subjected by reason of said injury; and such damages should be allowed as in the opinion of the jury would be a fair and just compensation for such injury and suffering.

RAILROAD COMPANIES, LIABILITIES OF: DEGREE OF DILIGENCE ON PART OF DEFENDANT: NEGLIGENCE OF PLAINTIFF.—Rail Road Companies are bound in the management of their engines and trains to use such diligence and care as prudent and discreet persons would use and exercise on such occasions, with such motive power and trains, having due regard to the safety of property and persons; and if owing to the absence of such diligence and care a party is injured, he is entitled to recover for the injury, unless from his own negligence or want of reasonable care he has brought the same upon himself.

——: ——: ——: THE INFANCY OF THE PLAINTIFF does not change either the degree of care or diligence to be used by the defendants in the management of their cars and engines, or enhance the measure of damages to be adopted by the jury.

THE RULES REGULATING THE RIGHTS AND DUTIES OF PERSONS, NATURAL AND ARTIFICIAL, to each other must be uniform; they cannot vary according to the years or degree of intellect of natural persons without producing an uncertainty in the law destructive of all principle.

APPEAL from the Superior Court of Baltimore City.

This suit was brought to the September term of the Superior Court of Baltimore City, 1861, by Jas. Coughlan, the next friend of Patrick Bannon, a minor, about seven years of age, to recover $3,000 damages for injuries sustained by the latter through the wrongful act, neglect or default of the Baltimore and Ohio Rail Road Company or its agents, on the 13th of October, 1860. The declaration contains three counts, to which the defendants pleaded "not guilty."

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1*st Exception.*—At the trial of the cause the plaintiff to maintain issue on his part joined, proved that on the 13th of October, 1860, being then about the age of seven years, he was injured by the cars of the defendants, and his right hand permanently maimed by being crushed by the passage of the wheels of said cars over it, cutting off the forefinger, and rendering him otherwise unfit for manual or mechanical labor. The plaintiff further proved that the said injury occurred near the front of his mother's house, which is located, with a number of others, on Locust Point, within a "Y" on the Locust Point Branch of said road, and then, for the purpose of showing negligence on the part of the company's agent, the plaintiff offered to prove that it was the daily practice of said agents, for many months before the happening of said injury, to back by the power of a locomotive large trains of iron coal cars of from forty to fifty cars, around a curve in a deep cut, by which backing a portion of the train of cars came around said curve and passed in front of the house of the plaintiff, and over the place where said injury happened; and the plaintiff accompanied said offer with further evidence to show that during the said backing of said cars as aforesaid, it was the daily practice of the employees and agents of said company, as aforesaid, to remain on or near the locomotive while it was engaged in backing the train of cars, and that said employees and agents could not from their position see the said road or any obstruction thereon, in the rear of the train, as it was so backing, and that no lookout or brakesman was ever stationed on the hindmost of said cars, as they had been daily backed around said curve to the point where said injury occurred; but the Court rejected said offered proof, being of the opinion that the evidence must be confined to the mode in which said cars were managed at the time of the occurrence of the injury as complained of, and thereupon the plaintiff excepted.

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2nd Exception.—After the evidence stated in the foregoing bill of exceptions, made a part hereof, the plaintiff, to support the issue on his part, offered in evidence by —— *Nunaven*, that he was a police officer of the city of Baltimore, on duty at Locust Point on the 13th of October, in the year 1860; that he knew the plaintiff, and that his mother, Mrs. Coughlan, lived at the corner of Towson and Marriott streets, where she kept a grocery; that the Baltimore and Ohio Rail Road passed from Nicholson street by a semi-circular track into Marriott street, close by the house of Mrs. Coughlan, forming what is called a "Y;" that the track passes through a cut between Towson and Haubert streets, in Marriott street, which latter street is not paved or used as a carriage road; that the next street to Towson street is Cooksie street, and that there are houses on Towson street within the "Y" which would prevent an engineman at the corner of Towson and Nicholson streets from seeing the end of the train if it extended past Mrs. Coughlan's house and store up Marriott street; that the cars of the defendants were at times left standing across Towson street, in the way of persons passing from Mrs. Coughlan's and other houses within the "Y" to a school house, and to a spring beyond the school house, and that he had notified the agents of the defendants to remove them; that hearing on the 13th October that an accident had happened in Marriott street he went to the spot, which was near the intersection of Cooksie and Marriott streets, and saw where a person had been dragged some distance, with marks of blood upon the ground and rails. The plaintiff further proved by *Joshua Wright* that he was on the spot immediately after the accident happened, and saw where the plaintiff lay, some twenty-five yards from the end of the train; that his brother had been killed and dragged that distance, and that there were no agents of the defendants

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about at the time. Witness aided in separating the cars so as to extricate the body of the boy that was killed.

Testimony to the same effect was given by *Michael Noonan* and —— *Davis.*

The plaintiff further proved by *Dr. Inloes* that he was the physician who attended the plaintiff and removed the forefinger of the right hand and dressed the second and third fingers, which were mashed and will remain permanently deformed; that there is no grasp in the hand, the power being lost in consequence of the accident; that the plaintiff was confined to bed three or four weeks, and there was a tendency to lockjaw, which required medical control, and that no other injury was done to the hand beyond that described; and although the remaining fingers would improve by use, they were in the opinion of witness permanently injured, and the plaintiff incapacitated from the free use of them for life.

The defendants proved by *Henry Linn*, a competent witness, that he saw the accident when it occurred; that the plaintiff, with his two brothers, were playing on the common near the intersection of Marriott and Cooksie streets, when the end of the train came backing round Mrs. Coughlan's corner into Marriott street; that the boys at once left their play and ran to the cars and attempted to get on them; that there were two on the track in front of the end car, who got on by holding with their hands on the bumper, with their feet on the break-bar; that the little one, the plaintiff, was trying to get off or fell off, and knocked the other off, who was killed; that witness did not see the plaintiff after the accident, his attention being attracted to the boy that was killed. On cross-examination witness said that he was at the time he saw the little boys playing on the common some fifteen or twenty yards from them, and in company with two other boys larger than himself, to whom he said, boys let us take a ride? Whether the three

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little boys of Mrs. Coughlan haerd him or not he could not swear. Witness saw no agents of the company about at the time of the accident. From the end of the train where it happened he could not see the engine. He did not hear a whistle blown or a bell rung. Was certain that both the boys, the one that was killed and the plaintiff, jumped on the cars.

The defendants further proved by *Mr. Stickes*, an employee of the defendants, that he knew the plaintiff and his two brothers; that he had often seen them getting on the cars, and had often warned them off, and told them the risk they ran; that witness had also told their mother of their conduct in this respect, and had seen her whip them for it, but she said she could not prevent it.

Parker, brakesman of the train in question, a witness for the defendants, proved that he had driven the three children of Mrs. Coughlan from the cars, and had threatened to whip them, and had also told their grandmother of their conduct; that this was prior to the 13th October, and on frequent occasions, certainly on more than one occasion; and that at the time of the accident the speed of the train did not exceed two or two and a half miles an hour. On cross-examination, the witness described the duties of the agents connected with the train,—and stated, that there was no one at the end of the train at the time of the accident, and that it was no one's business to be there; that the signal for backing the train, three blasts of the whistle, had been given before the train was backed on this particular occasion; that there was no bell rung, and there was none on the engine to ring; and that the whistles were signals to the persons connected with the train.

Ennes Toby, a witness for the defendants, proved that he was the engineman on the occasion of the accident; that the engine was a regulating engine, employed in the making

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up of trains at Locust Point, for another engine to take away ; that he was making up a train at this time, and adding the last cars ; that, on previous occasions, he had often seen the three boys getting on the cars when in motion, as well as in rest ; and that he has driven them from one part of the train, when they would run and get on another part.

On cross-examination this witness stated, that he always watched the crossing in front of Coughlan's house, but that, after the end of the train had passed it, he knew there was no crossing until the next paved street was reached, and anticipated no accident ; that from where his engine was on this occasion he could not see the end of the train, where the accident happened, nor did he know of the accident for half an hour afterwards ; that the speed of the train in backing at this time was very slow, and it could not have been otherwise, as there were fifty empty coal cars to be moved, and the grade up Marriott street was an ascending one, and it was as much as the engine could do to push the train backwards ; that it was going so slowly that any one, however young, could have got out of the way. The witness further proved, that the whistle was blown three times, as a signal for backing, before the accident, and he stated that, in his judgment, he had taken the utmost care under the circumstances ; that since the accident, he had, however, been more careful than before it, to see that there was no one in front of the end of the train in backing, and that there was no one of the defendants' agents at the end of the train when the accident occurred.

The plaintiff thereupon offered two, and the defendants four prayers, which are set forth in substance, in the opinion of this Court.

Which instructions of both plaintiff and defendants the Court, MARTIN, J., refused to give, but instructed the jury as follows :

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1st. That if the jury find from the evidence that the Baltimore and Ohio Rail Road Company are the owners of the railroad track or tracks, and of certain cars and engines used thereon, at Locust Point, in the City of Baltimore, along which track or tracks said cars and engines were drawn or propelled for the purposes and about the business of the said rail road company, then, in the movement, use and management of the said cars and engines, the said company is bound to exercise the utmost care and diligence which it was within their means and power to employ, to prevent accidents endangering the life or lives of the people and inhabitants of the said city; and if the jury find that the plaintiff was run over and injured by the defendants' cars, as described by the witnesses, and that if the defendants, in the use and management of their cars and engines, had exercised the highest degree of care and diligence which it was within their means and power to employ, the said accident could have been prevented, then the plaintiff is entitled to recover in this action; but, although the jury may find that the said accident could have been prevented by the use of such care and diligence on the part of the defendants, yet the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of that degree of care by the said plaintiff, which was, under the circumstances, to be naturally and reasonably expected from one of the plaintiff's age and intelligence, or by due care and diligence on the part of the mother.

2nd. That if, under the first instruction, the jury shall find a verdict for the plaintiff, they are not at liberty to give, upon the evidence in this case, against the defendants, exemplary, punitive or vindictive damages, but in estimating the damages they are to consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition in consequence of the

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said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those mechanical employments and pursuits for which, in the absence of the said injury, he would have been qualified ; and also the physical and mental suffering to which he was subjected by reason of the said injury, and to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injury which the plaintiff had thus sustained.

To which refusal of the Court to grant the defendants' prayers, and to the granting of the Court's instructions, the defendants, by their counsel, prayed leave to except, and the plaintiff's counsel, in like manner, prayed leave to except to the Court's refusal to grant said prayer of the plaintiff, and to the instructions given by the Court. Whereupon both plaintiff and defendants appealed.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN, and WEISEL, J.

A. S. Ridgeley and *Robert J. Brent* for Coughlan and Bannon :

I. The Court below erred in refusing to admit the testimony as offered in the plaintiff's first bill of exceptions.

1st. Because it contained some evidence from which the jury might infer that the cars were backed, and the manner of such backing, on the occasion in question, inasmuch as it was the defendants' custom so to back them in making up its trains.

2nd. Because the evidence offered tended to show a general recklessness and indifference to human life, which it was proper for the jury to consider, in connection with the question of damages. *Day vs. Woodworth*, 13 *How.*, 371.

II. The first instruction of the Court below was erro-

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neous, for the reasons stated in the appellant's argument, touching the first instruction, in the case of *Coughlan vs. Balto. & Ohio R. R., supra, p.* 84. *Redfield on Railways,* 337, *Pierce,* 278. *Lynch vs. Nurdin,* 41 *Eng. C. L. Rep.,* 422, (1 *Q. B.* 36.) 22 *Vermont R. R.* 213. 19 *Ver.* 407. 19 *Conn.* 566.

III. This action not being founded on the statute, but on common law principles for damage done to the plaintiff, an infant of seven years, we are to look, in the assessment of damages, to the rules of the common law which allow not only actual damages and *solatium* for the sufferings of the plaintiff, but such exemplary damages as the jury may think commensurate to the reckless and wanton conduct of the defendants' servants, and shall also contend that the Court below erred in its second instruction to the jury, in restraining them on the evidence in the case from the infliction of exemplary damages proportioned to the degree of negligence found to exist on the part of the defendants. *Farrish vs. Reigle,* 11 *Grattan,* 697. *Hopkins vs. Atl. & St. Law. R. R.,* 36 *N. H.,* 16 *to* 19. *Day vs. Woodworth,* 13 *How.,* 371. *Vicksburg Rail R. Co. vs. Patton,* 31 *Miss.,* (2 *Georg.*) 156. *Sedgwick on Measure of Damages,* 36—477 *and note.*

What would be ordinary neglect on the part of the defendants, as towards an adult plaintiff, would be gross neglect as towards a child. *Robinson vs. Cone,* 22 *Ver.,* 224. *Beers vs. Housatonic R. R.,* 19 *Conn.,* 566.

Any negligence in a case of this kind is gross negligence. *Stokes vs. Saltonstall,* 13 *Peters,* 181. *Whipple vs. Walpole,* 10 *N. H.,* 130. *Stockton vs. Fry,* 4 *Gill. Sedgwick on Damages,* 454. *Koutz vs. Brown,* 16 *B. Monroe, (Ky.)* 577. *City of Chicago vs. Mayor,* 18 *Ill.,* 349. *Johnson vs. Hud. River R. R.,* 6 *Duer,* 638. *Oldfield vs. N. Y. & Har. R. R.,* 4 *Kernan,* 317. *Penn. R. R. vs. Zebe et al.,* 33 *Penn.,* 330. *Riely's Case,* 31 *Penn.,* 372, *also* 361.

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In the event of an affirmance of the judgment as against the defendants on their appeal in this case, the plaintiff will abandon his exceptions. *Emory & Galt vs. Owings, &c.*, 3 *Md. Rep.*, 184. *Boehme vs. Carr*, 3 *Md. Rep.*, 210. 9 *Gill*, 376. *Garrett vs. Dickerson*, 19 *Md. Rep.*, 446.

J. H. B. Latrobe, for the appellee, relied on the authorities cited by him in the preceding case.

Bowie, C. J., delivered the opinion of this Court.

These appeals are taken from the rulings of the Court below, excluding certain evidence offered on the part of the appellant, Bannon, and rejecting certain instructions offered by the plaintiff and defendants, and the granting of others in lieu thereof by the Court, from which rulings each party appealed.

The cause of action, is injury sustained by the plaintiff, through the alleged wrongful act, neglect or default of the defendants or their agents, whilst moving their engine and cars in reversed order, over a semi-circular track called a "Y," on the Locust Point branch of the defendants' road. After evidence of the injury, for the purpose of showing negligence, the plaintiff proposed to prove it was the daily practice of the defendants to move their cars without a guard at the rear of the train over the "Y," which was so situated that the engineer at the engine could not see the rear, which evidence the Court rejected, being of opinion that the testimony must be confined to the mode in which the cars were managed at the time of the occurrence of the injury complained of; which constitutes the ground of the plaintiff's first exception.

There can scarcely be a question about the propriety of the Court's decision in this exception.

The general conduct of the defendants was not in issue. They were not required to meet such an investigation by

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the pleadings. The acts and omissions of their servants and agents at other times, furnished no legitimate evidence of their conduct upon the particular occasion referred to; and if they did, the safe conduct of the cars, for a long time before, without injury, would rather tend to mitigate than inflame the injury, showing there was no danger to the community in that mode of managing the cars. The evidence was collateral, and incapable of affording any reasonable presumption or inference as to the matters in issue and properly excluded. *Vide* 1 *Greenlf.*, *sec.* 52. The first and second prayers of the plaintiff, referring exclusively to the measure of damages, will be considered in connection with the instruction of the Court upon that subject.

The series of instructions offered by the defendants, substantially affirms:

1st. If the place where the accident happened was not a thoroughfare and used as such, or being crossed at the time by the plaintiff, and the cars were moving at a speed which would have permitted either adult or child to have avoided them, had he been using the street as a thoroughfare, or crossing the same, if he had used such diligence as was reasonably to have been expected of him, then the plaintiff is not entitled to recover.

2nd. If the plaintiff was just before the accident playing in a place of safety, and seeing the cars, ran and jumped on them, and fell off and was injured, he is not entitled to recover, although the jury believe the defendants did not use the care and diligence that would have prevented him from getting on the cars.

3rd. If in addition to the above facts, the plaintiff had been warned, and was of an age to understand such warning, and to know he was doing wrong, he is not entitled to recover, although the defendants had not used such care and diligence as would have prevented the plaintiff from getting on the cars.

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4th. If at the time of the accident the defendants were not complying with the ordinances offered in evidence regulating the use of locomotive engines in the City of Baltimore, yet the plaintiff is not entitled to recover, if the jury believe that his conduct was the immediate cause of the accident and his injury, the result of a want on his part of that degree of care which was under all the circumstances naturally and reasonably to be expected in one of the plaintiff's age and intelligence.

The instruction of the Court is silent as to the place being a thoroughfare, but affirms, if the defendants were owners of the track along which their cars were drawn or propelled about the business of the company, then, in the management and movement of said cars the company *is bound to exercise the utmost care and diligence* which it was within their means and power to employ to prevent accidents, endangering the lives of the people of the city; and if the jury find the plaintiff was injured by the defendants' cars, and if the defendants in the use of their cars, had exercised the *highest degree of care* and diligence which it was within their means and power to employ, the said accident could have been prevented, then the plaintiff is entitled to recover; but, although the jury may find that the said accident could have been prevented by the use of such care and diligence on the part of the defendants, yet the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of that degree of care by said plaintiff, which was, under the circumstances, to be naturally and reasonably expected from one of the plaintiff's age and intelligence.

The theory of the defendants' prayers, taken collectively, is, that if the injury was owing to the want of the reasonable care and diligence on the part of plaintiff, the defendants are not liable; although they might have prevented the accident by the exercise of the utmost care and diligence.

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The theory of the Court's instruction is, that the defendants, in the movement and management of their engines and cars, were bound to use the utmost care and diligence, and if, by so using it, the accident might have been prevented the plaintiff is entitled to recover, unless the jury believe the accident could have been avoided by the exercise of such care as was reasonably to have been expected from the plaintiff.

The difference between the two propositions is, that under the Court's instruction the defendants were bound to use the utmost care and diligence, and if the defendants were not in default at all, and the plaintiff was, he cannot recover, under the defendants' prayer, although the defendants were in default, yet the plaintiff cannot recover if his own want of care, etc., was the cause of his injury.

In the preceding case of the *State, use of Coughlan, vs. B. & O. R. R. Co., supra, p.* 84, we have pointed out the different degrees of diligence required by law, of carriers of passengers, etc., towards those with whom they are in the relation of carriers by contract, or trust and confidence, and the degree of diligence required of them towards third persons, merely in the exercise of their legal rights. In the former case, as lately decided by this Court in the case of *Worthington vs. The Baltimore and Ohio Rail Road*, the defendants are required to use the utmost care and diligence, but in the latter they are required only to exercise such care and skill as persons of ordinary prudence practice about their business. *Vide* 8 *Barb.* 368. *Rail Road vs. Norton*, 24 *Penn. Rep.*, 465.

WILLARD, Justice, delivering the opinion of the Court, in the case of *Brand vs. The Troy and Schenectady Rail Road Company*, uses this emphatic language, "that a passenger on board a stage coach or rail road car, and a person walking on foot in the street, do not stand in the same relation to the carrier. Towards the one the lia-

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bility of the latter springs from a contract, express or implied, and upheld by an adequate consideration. Towards the other he is under no obligation but that of justice and humanity. While engaged in their lawful business, both are bound to use a degree of caution suited to the exigencies of the case; the one to avoid the occasioning an injury, and the other to avoid receiving it. What that degree of caution is, which they are respectively bound to exercise, may be seen by a brief consideration of the degrees of care which the law exacts from persons engaged in the various pursuits of life." After reviewing the different degrees of diligence and care required of bailees and others, he proceeds:

"In general the highest diligence is not exacted of any person except when a compensation is paid for the service, or the party injured was in the power, and under the control of the defendants as in the case of stage passengers; or the party officiously obtrudes his services upon another; or is the sole party receiving a benefit from the act, or the party occasioning the injury, was in the wrong place, or engaged in an unlawful calling." If both parties stand on an equality as to means of avoiding the accident, and both are engaged in a lawful employment, it is hard to conceive how more than ordinary diligence can be demanded. 8 *Barbour Sup. Ct. Rep.*, 378, 380.* * In illustration of the same principle, "one who was engaged upon the track of a railway, by the direction of the superintendent of the company, and was injured by the engine of another company lawfully upon the track, could not recover of the latter company, although their engineer was guilty of carelessness, being himself also in fault." *Railroad vs. Norton*, 24 *Penn. Rep.*, 465.

This language was used in the case of an injury inflicted on a woman while walking on the track of a railway in the streets of a city.

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The first instruction granted by the Court required the jury to find the exercise of the utmost care and diligence which it was within the means and power of the defendants to employ, to prevent accidents endangering the lives of the people, to exonerate the defendants from liability, unless they should find the accident could have been avoided by the exercise of that degree of care by the said plaintiff, which was, under the circumstances to be expected from one of the plaintiff's age. This was exacting more than the law required of the defendants, as it would seem from the authorities cited, and therefore erroneous.

The second instruction given by the Court was intended as a substitute for the first and second offered by the plaintiff, prescribing the kind and measure of damages. These, upon the assumption that the injury was caused by gross negligence of the defendants, authorized the jury to allow "such punitive or exemplary damages, as in their discretion they might think right and proper under the circumstances." 2d. That they were not limited to the actual pecuniary injury they may believe the plaintiff has suffered, but were at liberty to award damages for all future pecuniary damages which will result from the injury, and also such damages as would be an adequate compensation for the pain and illness consequent upon the injury complained of.

The first of the plaintiff's prayers was liable to objection for the unlimited discretion it proposed to give the jury, without any guide to its exercise; the pernicious tendency of which practice has been so strongly exposed in the cases cited by this Court in the case of *The State, use of Coughlan, vs. The B. & O. R. R. Co., supra, p.* 84. Without adopting or denying the proposition so elaborately discussed by the learned jurists, Sedgwick and Greenleaf, that "wherever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, instead of adhering to the

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system or even language of compensation, the law permits the jury to give what it terms punitive, vindictive, or exemplary damages," its application must entirely depend upon the circumstances of the case and the evidence in the cause. There is no element of fraud, malice or oppression in this case, but the inquiry is, was there gross negligence?

Gross negligence is a technical term; it is the omission of that care "which even inattentive and thoughtless men never fail to take of their own property," it is a violation of good faith. *Angel on Carriers, sec.* 10. It implies malice and evil intention. Hence in all questions of punitive or vindictive damages, the intention of the defendants is a material consideration.

"What is, and what is not gross negligence, is often a mixed question of law and fact." *Angel on Carriers, sec.* 22, 27. *Pierce on Rail Roads*, 282, 283. Whether malice or gross negligence existed, is a question for the jury; but what facts are sufficient to prove malice or gross negligence, is in such cases the province of the Court to determine.

"The Judge is to inform the jury as to the degree of diligence, or care or skill which the law demands of the party, and what duty it devolves on him, and the jury are to find whether that duty has been done. *Hunter vs. Caldwell*, 11 *Jur.*, 770. 10 *Adol. and Ell.*, 69. 11 *M. and W.*, 817, and other cases cited by *Greenleaf, note* 1 *to sec.* 49, *page* 70, 11*th edition.*

The law requiring of the defendants only ordinary care and diligence towards third persons, not passengers or connected with the defendants by contract, trust or confidence; there was no evidence of gross negligence, which would warrant the Court to instruct the jury, that if they should find such on the part of the agents of the defendants, they might allow punitive or exemplary damages. The prayer was for this additional reason properly rejected.

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The case being divested of all aggravating circumstances, the second instruction granted by the Court enumerated all the elements of compensatory damages which properly belonged to it.

The infancy of the plaintiff does not change either the degree of care or diligence to be used by the defendants in the management of their cars and engines, or enhance the measure of damages to be adopted by the jury. The rules regulating the rights and duties of persons natural and artificial to each other, must be uniform; they cannot vary according to the years or degree of intellect of natural persons, without producing an uncertainty in the law destructive of all principle. For this reason, and others which might be in the conflict of suggested decisions, we think those of *Hartfield vs. Roper*, 21 *Wend.*, 615, and *Willetts vs. Buffalo & Rochester R. R.*, 14 *Barbour*, are to be preferred to *Lynch vs. Nardin*, 1. *Q. B.*, 29.

In *Hartfield vs. Roper* (21 *Wend.*, 615,) the action was by an infant two years old. He was in the sleigh path alone, and was run over and injured. It was held that no action would lie if the injury was not voluntary, or from culpable negligence. The rule of negligence was applied to the case, and the want of care on the part of the parents was regarded as a want of care on his part.

Willetts' case was that of an infant lunatic left by his father in the cars, and put out by the conductor, ignorant of his lunacy, in consequence of his failing to show his ticket; afterwards he was run over by another train and killed. It was held the negligence of the parent was the negligence of the child, and his administrator could not recover. The general principle is thus announced: "all persons incapable of diligence should, and usually have guardians to care for them; upon them the duty of care and diligence is devolved, and their negligence must in

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law be regarded as the negligence of the incapable infant or lunatic when they have been injured in cases arising between them and third persons acting without notice."

It results from what has been said, that the defendants were bound, in the management of their engines and trains, to use such diligence and care, as prudent and discreet persons would use and exercise on such occasions, having due regard to the safety of property and persons with such motive power and trains; and if, owing to the absence of such diligence and care the plaintiff was injured, he was entitled to recover, unless from his own negligence or want of reasonable care, he brought the injury upon himself.

The defendants' first, second, third and fourth prayers are defective, in not presenting this alternative distinctly to the jury. They enumerate certain facts, and specify a certain want of care in preventing the plaintiff from getting on the cars, but do not refer to the absence of ordinary care and diligence in the general management of the engine and train on that occasion, as an element of the condition on which would necessarily depend the right of the plaintiff to recover.

The conclusion from the foregoing is, that the Court below was correct in rejecting the evidence set out in the plaintiff's exception, and in rejecting the plaintiff's and defendants' prayers; and also in giving its second instruction; but that there was error in the first instruction granted by the Court, hence the judgment below must be reversed and a *procedendo* awarded.

Judgment reversed and
Procedendo awarded.

(Decided February 28th, 1866.)

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HENRIETTA R. GLENN, WILLIAM W. GLENN AND JOHN GLENN, EXECUTORS OF JOHN GLENN, DECEASED, *vs.* THOMAS Y. CANBY.

REAL AND PERSONAL COVENANTS: COVENANT TO PAY MORTGAGE DEBT.—A borrowed money of B to be expended in erecting houses upon certain land, and executed to B a mortgage of the land by which he covenanted for himself, his representatives *and assigns* to pay the mortgage debt; and it was expressly declared in the mortgage that this, with certain other covenants, *should run with the land.* In an action upon this covenant to pay the mortgage debt, brought against an assignee of the mortgagor, HELD:

That the said covenant was not a covenant running with the land, and did not bind the assignee.

APPEAL from the Superior Court of Baltimore City.

The facts of this case are stated in the opinion of this Court.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN, and WEISEL, J.

S. Teackle Wallis for the appellant argued:

1st. That the covenant to pay the money to be advanced under the mortgage, was one which, under the circumstances, and looking to the peculiar character of the transaction, bound the assignee.

The whole transaction was, in fact, a building contract, in which, although the mortgagees were not the lessors, the lease was, as the mortgage shows, procured in contemplation of the loan of the mortgage money, and under and with a view to the execution and covenants of the mortgage, and to secure the erection of the buildings provided for. The money paid was therefore not merely loaned on the land, but for a purpose connected with and attached to the land, and involved in its improvement. The covenant, as a consequence, was expressly fixed on the "*assigns*," as a

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condition of the loan, the power to sell was specifically limited, not only by being made subject to the "other terms and conditions" set forth in that instrument, but "subject to the payment of said loan and advance," in terms.

Canby, it is argued, took with full notice of all these terms and conditions, and subject to them. He bought before the period had expired for the completion of the houses, and while the advances were still running on the whole premises. He cannot claim the position of an ordinary assignee, taking a term of years subject to an ordinary mortgage, for the mortgage itself was notice to him that it was of an unusual character, and clogged with conditions not only restricting the assignment of the leasehold interest, as to time, but making the assignee subject to the payment of the advances provided for. He therefore assumed the interest which he acquired, with the liability annexed, as part of his contract, and took a special warranty to protect himself. *Platt on Covenants*, 471 *to* 475, 480, (3 *Law Lib.*, 210, 214.) 1 *Smith's Leading Cases*, 102, 109, 157, 158, 159, 160. *Cougleton vs. Pattison*, 10 *East.*, 137. 2 *Sugden's Vend. & Pur.*, 471, 483. *Harris vs. Goslin*, 3 *Harrington*, 338. *Norman vs. Wells*, 17 *Wend.*, 148, 149. *Balby vs. Wells*, 3 *Wilson*, 27. *Thomas vs. Von Kapff*, 6 *G. & J.*, 372.

2nd. That under the demurrer in this case the defendant confesses the averment of the 7th count of the narr., to the effect, that he "*accepted*" the assignment of the term, subject to the covenants of the lease. He is bound by that admission, which is conclusive.

In reply to the third point of the brief of the appellee, the following cases were cited: *Tillitson vs. Boyd*, 4 *Sand.*, 517, 522. *Jarel vs. Jarel*, 7 *Paige*, 595. *Stebbins vs. Hall*, 29 *Barb.*, 524. *Murray vs. Smith*, 1 *Duer*, 427.

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For the proper form of declaration the appellant's counsel referred to 1 Code p. 512, form No. 21.

It was further argued in reply, that if privity between the mortgagee and assignee of the equity of redemption is necessary, the covenants for payment of rent, insurance and taxes, establish privity. In support of this proposition, see cases cited under the appellant's 1st point.

Henry G. Garey for the appellee.

1st. There is no privity between the mortgagee and the assignee of the mortgagor, by reason whereof the covenant of the mortgagor to pay the mortgage debt can run with the land, for the benefit of the mortgagee. 1 *Hillyard on Real property*, 429, ch. 32, *sec.* 1. *Dougherty vs. McColgan*, 6 *G. & J.*, 285. *Jamesón vs. Bruce*, 6 *G. & J.*, 74. *Howard vs. Ramsey*, 7 *H. & J.*, 122. *Jackson vs. Fuller*, 4 *Johns*, 215.

2nd. The covenant in the mortgage to pay the mortgage debt, is merely a *personal covenant*, and cannot bind the assignee of the equity of redemption, although expressly named. 1 *Smith's Leading Cases*, 75, *Spencer's case, m. p.* 23, 24. *Canham vs. Rust*, 4 *Eng. C. L. Rep.*, 80. *Burton vs. State*, 3 *Gill*, 12. *Flight vs. Gossop*, 2 *Bingham's New Cases*, 125, (29 *Eng. C. L. Rep.*, 279.)

3rd. The acceptance of a deed from the mortgagor, of the equity of redemption, will not bind the vendee to pay the mortgage debt, even when he takes the property "subject to the mortgage," *a fortiori*, when the mortgage is not mentioned in the deed, and the purchaser does not assume the payment of the incumbrance. *Butler vs. Butler*, 5 *Vesey*, 535. *Cumberland vs. Codington*, 3 *Johnson's Ch.*, 262, 264, 272. *Dorr vs. Peters*, 3 *Edward's Ch.*, 132. *King vs. Whiteley*, 1 *Hoffman's Ch.*, 477.

4th. The absurdity and inconvenience of allowing such covenants to run with the land and bind the assignee, are

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fully set forth by Lord Chancellor Brougham, in *Keppel vs. Bailey*, 2 *Mylne & Keene*, 517, (8 *Eng. Cond. Ch. Rep.*, 120.)

COCHRAN, J., delivered the opinion of this Court.

The demurrer in this case presents the question whether a covenant of a mortgagor, for himself, his representatives, and assigns, to pay a mortgage debt, binds the assignee of the mortgaged property; or in other words, whether by force of the term *assigns*, such a covenant runs with the land.

The mortgage exhibited here, shows that the debt secured was a loan made to enable the mortgagor to improve the property described in the mortgage; it also contains a clause declaring that the covenant to pay the debt, with others, relating to insurance and taxes, should run with the land; and it was insisted, on these grounds, that the covenant in question, should be held to bind the appellee, to whom the property was subsequently assigned by the mortgagor. We have concluded, however, that these considerations have no immediate bearing on the point to be decided. The legal operation and effect of the covenant, in that particular, must be determined by its subject matter, and not by the terms in which it is expressed. The established doctrine is, that a covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate conveyed, and thus constitute a condition annexed, or appurtenant to it; there must also be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it. If, however, on the other hand, the covenant does not extend to, nor affect the quality, value or mode of enjoying the land conveyed, and is

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merely collateral to it, or is of such a character that a performance of it will defeat the estate of the party claiming the performance, then it does not run with the land, nor bind the assignee of the covenantor, though he be expressly included by the general term *assigns*. *Spencer vs. Clark*, 1 *Smith's Lead. Ca.* 115, 2 *Sug. on Vend.*, 178. *Platt on Cov.*, 3 *Law Lib.*, 205, 215, 3 *Term, R.*, 393, 8 *East*, 487, 10 *East*, 130.

Tested by these general principles, this is clearly a personal, and not a real covenant. It is for the payment of a debt of the mortgagor—a liability, personal in its nature, that neither relates to, nor affects the quality, condition or value of the land, and the performance of it would at once divest the covenantees of their interest in it. The fact that the debt was contracted for the purpose of improving the property, does not enlarge the operation, nor change the character of the covenant, and as its performance will not affect the land, we conclude that the appellee is not bound by it, and that the demurrer was properly sustained.

Judgment affirmed.

(Decided March 2nd, 1866.)

ELISHA D. WHITNEY *vs.* SAMUEL G. WYMAN, GEORGE H. BYRD AND JAMES C. SMITH, GARNISHEES OF JOSEPH RIPKA ET AL.

CONSIGNOR AND CONSIGNEE.—A factor who receives goods on consignment without any limit as to time, mode or rate of sale, and makes advances or incurs liabilities on account of the goods consigned, thereby acquires a special property in them, and a right to sell, according to the usual course of his duty, so much thereof as may be necessary to reimburse such advances or meet such liabilities. And the consignor has no right by any order given

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after the advances have been made or liabilities incurred, to control this right of sale, except so far as relates to the surplus of the goods not necessary for the reimbursement of such advances or liabilities, unless he stands ready and offers to reimburse the advances or liabilities.

APPEAL from the Superior Court of Baltimore City.

This was a case of *attachment on warrant* issued out of the Superior Court of Baltimore City, at the instance of the appellant, to affect the goods, chattels, &c., of Joseph Ripka & Co., non-resident debtors, and laid in the hands of the appellees as garnishees.

It appeared, at the trial, that at the time of the service of this attachment, the appellees had in their hands a large amount of dry goods, which had been consigned to them for sale, as factors, by the said defendants, and on which they had, *previously*, made considerable advances; and that also prior thereto, to wit: on the 6th of November, 1860, they had accepted an order, drawn by the defendants, in favor of a certain D. C. W. Smith, for $2,000,—provided there should be any balance in their hands.

The garnishees continued the sale of the said goods after the attachment, until June, 1862, when the last parcel was disposed of,—the case having, in the meantime, been continued from term to term. The entire proceeds of the said sales were not more than sufficient for the reimbursement of the advances made by the appellees, and the discharge of the said order in favor of Smith, and there consequently remained no balance in their hands, applicable to the attachment of the appellant.

With a view to ascertain the state of the account between the garnishees and the defendants, the plaintiff filed interrogatories which the garnishees duly answered. So far as this appeal is concerned, the facts will be found, chiefly, in the garnishees' answer to the fifth interrogatory, and in the agreement of counsel.

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The answer to the fifth interrogatory is as follows:

"The garnishees, in their answer to the first and second interrogatories, have stated that they have on hand, of the goods and merchandise belonging to the said Joseph Ripka & Co., forty-one thousand two hundred and ninety two yards, and that after said goods were consigned to the said garnishees, to wit: on or about December 10th, 1861, the said Ripka & Co. put a limit of prices at which said goods should be sold, and instructed them not to sell the same for less; that valuing the said goods according to such prices, the said 41,292 yards would realize, in gross, at credit of six months, seven thousand nine hundred and eighty-four dollars and sixty-nine cents, upon which the estimated charges and expenses due to the said garnishees, are five hundred and fifty-eight dollars and eighty-eight cents, leaving as net value of said goods, according to above estimate and limit, the sum of seven thousand four hundred and twenty-five dollars and eighty-one cents; comparing this net value of goods with what is hereinbefore stated to be the balance due to the said garnishees, as of 6—9 March, 1862, we have as the amount due to the said Joseph Ripka & Co., by the said garnishees, (provided the said goods could be sold realizable, 6—9 March, 1862,) the difference between $7,425 81 and $3,204 23, viz: $4,221 58; but the said garnishees feel bound to state that the said goods could not be sold for the prices above limited, and if sold, therefore, they would not realize the aforesaid sum of $7,425 81.

"And the said garnishees, in conclusion, respectfully represent, that any balance which may remain in their hands after satisfying their own aforesaid claim of $3,204 23, and their charges and expenses on said unsold goods, is first to be applied to the payment of the aforesaid claim of D. C. Wharton Smith, of $2,000, and interest from November 3,

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1860, till paid, accepted as aforesaid by the said garnishees, which said claim is, as they verily believe, in all respects, for value and *bona fide*."

The agreement of counsel, and the letters to which it refers, are as follows:

"*E. D. Whitney vs. Wyman, et al.*, garnishees of Ripka & Co.—Superior Court.

"It is admitted in this case that a short time prior to March 15, 1862, Bernard Carter, Esq., who was at that time acting as attorney of the garnishees, called on Mr. Dobbin, the attorney of the plaintiff, and asked the latter what the wishes of the said plaintiff were as to the course to be pursued with reference to the said attachment, and the sale of the said goods, and that Mr. Dobbin, a few days thereafter, handed to Mr. Carter the letter of the plaintiff, of March 15, 1862, and the same was sent by Mr. Carter to the garnishees, and returned to Mr. Carter by them, with the 'sketch' mentioned in said letter, accompanied by the letter of the garnishees to Mr. Carter, of March 19th, 1862, and thereupon all of said papers were handed by Mr. Carter to Mr. Dobbin. It is also admitted that prior to this, and about the time of the filing of the answers to the interrogatories, it was agreed between Mr. Dobbin and Mr. Carter that said attachment case should be, from time to time, continued or passed, and that said garnishees should continue the sale of said goods in the usual way, till the same were disposed of. But said agreement was not meant to waive the legal rights of either party to said agreement.

"It is also admitted that the handwriting of the drawer of the check is the proper handwriting of defendants, and the endorsement is the proper handwriting of said Cudbury, and they are co-partners in trade, resident in Philadelphia.

GEORGE W. DOBBIN,
Attorney for plaintiff.
BERNARD CARTER,
Attorney for defendant."

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"PHILADELPHIA, *March* 15, 1862.

GEORGE W. DOBBIN, *Baltimore.*

"Dear Sir:—Yours of the 14th is received. Messrs. Wyman, Byrd & Co. have written to Ripka & Co., under date of 13th inst., that they have no desire or intention to sell the goods below their views, and this we think is the best shape to keep the matter in, so far as I am concerned, for if they were to sell them so as to produce only about $2,000 more than their own claim, Mr. Smith would take that and I should get nothing, as I come in *after* they and Mr. Smith are paid. The limits given by Ripka, December 10th, we think not too high for some of the goods, and some styles might have to be shaded a little to effect sales, and make them go off this spring, and this is the plan we wish Messrs. Wyman, Byrd & Co. would pursue, so as to make the goods bring enough to pay themselves, Mr. Smith, and a part if not the whole of my attachment. By this course they will get interest on the claim and a commission on the goods when they sell them. Will you be kind enough to ask Messrs. Wyman, Byrd & Co. to give you a *sketch* of such sales as they may have made since 1st of January, and let me have a copy for information.

"The '*blue batch cords*' limited, 10th December, at 22 cents we think a *low* limit, as the same goods are held in this market at 26 cents, and the lowest sale of them since the 1st of January that we have heard of is 25 cents.

"I have no doubt now that Messrs. Wyman, Byrd & Co. do the best they can with these goods, and that they can sell them and realize *a part*, if not the whole, of my attachment. Yours, truly,

E. D. WHITNEY."

"BALTIMORE, *March* 19, 1862.

BERNARD CARTER, ESQ., *Baltimore.*

"Dear Sir:—We have your favor of yesterday enclos-

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ing letter from E. D. Whitney to G. W. Dobbin, which we return herewith. As requested, we wait on you with above sketch of Ripka's goods since 1st January.

Yours, most truly,

WYMAN, BYRD & Co."

Sketch of Sales by Wyman, Byrd & Co. for account of Messrs. Joseph Ripka & Co., since sales rendered.

B. B. S. C. 619, 1	Case	Star Checks,	20,	6 Months.
W. C. 2120, 1	"	Union Checks,	17,	" "
W. S. 3937, 1	"	Union Stripes,	17,	" "
B. B. C. 2249, 1	"	Brown Ribbed Cass.	17,	" "

4 Cases.

It was admitted that in the sale of the said goods the garnishees acted in good faith, and obtained the best market price therefor, and that no limit was placed upon the sales of said goods prior to 10th December, 1861.

The plaintiff then prayed the Court to instruct the jury as follows:

If the jury shall find from the evidence that on the 23d of January, 1862, the garnishees had in their hands goods of the defendants, consigned by them to the said garnishees under limits of price previously given, and that the said goods, if sold at the said limits, would have produced $7,984.69, and if they shall find that the only sum owing by the said defendants to the said garnishees was the sum of $3,204.42, due on the 9th of March, 1862, and that the said garnishees had, prior to the issuing of this attachment, to wit: on the 5th of November, 1860, accepted an order drawn in favor of one Smith by said defendants on said garnishees for $2,000, with interest from the 5th of November; and that on or about the 14th of March, 1862, the said garnishees applied to the plaintiff in this attachment to know what his wishes were in relation to the sale of

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said goods, when the said plaintiff communicated to the said garnishees his wish that the said goods should not be sold under the said limits, then the plaintiff is entitled to recover under the second issue the whole value of said goods at said limits, to wit: the sum of $7,984.69, or such other sum as they may think would have been produced by the sale of said goods in conformity to the wishes of the plaintiff, if they find such wishes, less the debt due by the defendants to the said garnishees, and the amount of the order and interest due to Smith, notwithstanding the jury may find that the said garnishees did, in fact, sell the said goods for the best market price, being less than the said limits; unless they shall also find that the said garnishees gave notice to the plaintiff of their intention to sell below the said limits, and requested him if he desired to avoid said sale to provide other means for their reimbursement.

And the garnishees prayed the Court to instruct the jury as follows:

1st. If the jury find from the evidence that goods were consigned by the defendants, J. Ripka & Co., to the garnishees, Wyman, Byrd & Co., on which the said Wyman, Byrd & Co. had made advancements prior to the issuing and service of the attachment in this case, and that also prior thereto the said Wyman, Byrd & Co. had accepted an order drawn by the said J. Ripka & Co., in favor of a certain D. Wharton Smith, and shall further find that the said goods were sold by the said Wyman & Co., and there remained no balance on the sales thereof in their hands after reimbursing themselves for their advancements, and deducting proper charges and commissions for the said sales, and the discharge of the order before mentioned, then, that the plaintiff is not entitled to recover; provided the said garnishees used reasonable skill and ordinary diligence in effecting the sales of said goods, and sold the same at the dates shown by the accounts offered in evidence by

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the garnishees, and for the best rates then obtainable for said goods in the market.

2nd. If the jury find from the evidence that goods were consigned by the defendants, J. Ripka & Co., to the garnishees, Wyman, Byrd & Co., on which the said Wyman, Byrd & Co. had made advancements prior to the issuing and service of the attachment in this case, and also prior thereto, the said Wyman, Byrd & Co., had accepted an order drawn by the said J. Ripka & Co., in favor of a certain D. Wharton Smith, offered in evidence by the garnishees; and shall further find that the said goods were sold by the said Wyman, Byrd & Co., and that neither at the time of serving said attachment nor since did there remain any balance in their hands upon said sales after the reimbursing of themselves for their advancements, and deducting proper charges and commissions, and the discharge of the order before mentioned, then the plaintiff is not entitled to recover.

3rd. That there is no evidence of any demand of payment of the check, which constitutes the cause of action of the plaintiff in this case, and of due notice of non-payment of the same of the drawers, nor any service of notice of said demand, and that in the absence of such evidence the plaintiff cannot recover.

4th. That there is no evidence to entitle the plaintiff to recover against the defendants for money lent by the plaintiff to the defendants, and that under the short note filed the plaintiff is not entitled to recover for any other cause of action.

The Court (MARTIN, J.) rejected the plaintiff's prayers, and the third and fourth prayers of the garnishees, and granted the garnishees first and second prayers, and from this action of the Court the present appeal is taken.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

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George W. Dobbin and *George L. Dobbin*, for appellant, argued:

That as the garnishees held the goods in question under limits of price they were bound to give notice to the plaintiff of their intention to sell without regard to the limits, so as to have given the plaintiff an opportunity to reimburse and discharge the advances they had made to the defendants, and the liability they had come under to Smith; and that having sold without regard to said limits, and without notice to the plaintiff, they are responsible to the plaintiff for whatever the goods would have yielded, if sold at the limits, over and above their advances, acceptance and expenses. *Brown & Co: vs. McGran*, 14 *Peters*, 494.

Levin Gale and *Bernard Carter* for the appellees.

The questions raised by the prayers may be considered under the following heads:

1st. The liability of the appellees, as garnishees, to the appellant, in respect of the goods consigned to them by the defendants, must mainly depend upon their responsibility to the defendants on account of those goods. *Balto. & Ohio R. R. Co. Garn. of Cent. O. R. R., vs. Wheeler*, 18 *Md. Rep.*, 379. It will hereafter be shown in what cases it is less than that which the defendants might enforce against them.

2nd. That at the time of the consignment of the goods to the appellees, and their advances thereon, there were no limits imposed, or instructions given, by the defendants, either as to the time or mode of sale. The appellees acquired, therefore, the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode, as the usage of trade, and their general duty required. *Brown and others vs. McGran*, 14 *Peters*, 479—495, 496.

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3rd. That contemporaneously with the said consignment and advances, there was no contract or agreement, express or implied, in relation to the time or mode of selling the said goods. Neither the defendants, nor the appellant, could, therefore, *by any subsequent orders or instructions*, suspend, modify, or control the right of sale thus acquired by the appellees,—such orders or instructions, if any, not having been accompanied with any offer to reimburse the appellees for their advances. See cases cited under third point.

4th. That there is no evidence to show that any limits were, *at any time*, imposed by parties authorized to do so; and that if any limits were so imposed, they were removed by the action of the assignee of J. Ripka & Co.

5th. That the interview between Messrs. Carter and Dobbin, and the subsequent receipt and delivery to them of the plaintiff's letter, did not create a contract or agreement, by which the appellees relinquished, or surrendered the *previous* legal right, thus so clearly acquired by them, of selling the said goods for the purpose of realizing their advances.

A. Because no proposition to that effect was made, either in the said letter of the plaintiff, or by Mr. Dobbin, in the course of his interview with Mr. Carter.

B. If there was, the appellees never assented to it, either expressly, or by implication, directly or through the medium of Mr. Carter.

C. If Mr. Carter assented, expressly or impliedly, he had no authority, as an Attorney at Law to do so; nor did he possess any authority, derived by virtue of any special delegation from the appellees.

D. Because, if the element of assent were not wanting, the agreement on the part of the appellees, having neither been founded on any valid consideration, nor made under seal, can only be regarded as a *nudum pactum*.

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6th. Factors and other bailees for hire are generally held only for a reasonable exercise of skill, and for ordinary care and diligence in their vocation. It having been admitted at the trial in the Court below, that in the sale of said goods, the appellees acted in good faith, and obtained the best market prices for them, the manner and character of the sales cannot be called in question. *Story on Bailments, secs.* 455, 456.

7th. But in any event, there having been no credit or balance in the hands of the appellees, after the reimbursement of their advances, and the discharge of the order in favor of D. C. W. Smith, nothing can be recovered by the appellant, under the pleadings in this case. If a limit had been imposed, or instructions given, contemporaneously with the said consignment and advances, as to the time or mode of sale, and that limit, or those instructions had been violated ; or if there had been any other breach of duty in making the sales, the appellees would have been liable to an action for the damages sustained by the defendants, J. Ripka & Co., or by the appellant, if his legal rights had been violated. But a claim resting in damages, and depending upon a possibility merely, is not attachable. The reason is, that it can only be recovered by an action *ex delicto*, and not by an action *ex contractu*. It can in no sense be regarded as a credit. 1 *Bouvier's Law Dictionary*, 351. *Sergeant on Attachment*, 76, 77. *Drake on Attachment*, § 527, § 525, § 526, and § 529.

8th. Admitting that we are wrong on other points, the measure of damages as laid down in the plaintiff's prayer, is not law. 3 *Parsons on Cont.*, 190, (*notes.*) *Frothingham vs. Everton*, 12 *N. H.*, 239.

COCHRAN, J., delivered the opinion of this Court.

We understand it to be finally settled, that a factor, who receives goods on consignment, without any limit as to

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time, mode, or rate of sale, and makes advances or incurs liabilities on account of the goods consigned, thereby acquires a special property in them, and a right to sell, according to the usual course of his duty, so much thereof as may be necessary to reimburse such advances or meet such liabilities; and further, that the consignor has no right, by any order given after the advances have been made or liabilities incurred, to control this right of sale, except so far as relates to the surplus of the goods not necessary for the reimbursement of such advances or liabilities, unless he stands ready, and offers to reimburse the advances or liabilities. *Brown vs. McGran.* 14 *Peters*, 479.

The consignments in this case were general; the appellees having received, and made their advances on them, without any instructions from the consignors in regard to the selling prices, time, or mode of sale. The letter of the 10th of December 1861, fixing limits below which the goods were not to be sold, was written long after the appellees received the consignments and made the advances, and there is nothing in the record to show that the consignors offered or tendered themselves ready to reimburse the advances, either at the time or after this letter was written; nor do the appellees appear to have assented to, or agreed with them, to comply with the instructions it contained. Under these circumstances, the limit put on the goods by the consignors was not of a character to affect in any degree the then existing right of the appellees to sell according to the usual course in such cases; and, in that particular it is admitted that they acted in good faith, and obtained the best market price for the goods sold. We find nothing in the communications from the appellees to the appellant, nor in his reply to them to relieve the case from the operation of the rule stated. That of the former was a simple request for the views or wishes of the latter in

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regard to the unsold goods, and his reply, contained in the letter to Mr. Dobbin, instead of requiring them to regard the limits prescribed in the December letter from Ripka & Co., clearly authorized such a variance or disregard of them as would enable the appellees to sell the goods. The clear inference from all the correspondence offered in evidence, is that the appellees were to sell the goods in the exercise of a sound discretion, and as there is no pretence that they did not make the best possible disposition of them, we think there was no error in rejecting the appellant's prayer, nor in granting the first and second of the appellees.

Judgment affirmed.

(Decided March 2nd, 1866.)

GEORGE SMALL *vs.* ADOLPHUS C. SCHAEFER.

AGREEMENT: CONSIDERATION: PAROL PROMISE TO PAY THE PRE-EXISTING DEBT OF ANOTHER: STAT. 29, CHARLES II, SEC. 4.—G, a broker, received from the defendant certain moneys to invest in bonds, and being then indebted to the plaintiff gave the latter his check for the amount due him, and deposited with the cashier of his bank five State bonds, to make his checks good. Three of the bonds so deposited had been purchased upon the order and with the money of the defendant, but never delivered to him, yet marked in pencil with his initials. These bonds were transferable by delivery, and neither the bank nor the plaintiff were aware of the defendant's claim to a part of them. After the deposit the bank overpaid checks of G but did not pay the check given to the plaintiff. G failed a few days after depositing the bonds in bank. When the defendant called on him, G told him the bonds were pledged with the bank to secure its overpayment of his checks and the unpaid check to the plaintiff; upon which the plaintiff proposed, if G would give him an order for the five bonds he would make good the amount due on them to the bank, and also pay G's check to the plaintiff, to which G agreed. Upon the presentation to the bank of the orders given under this agreement for the delivery of these bonds, and upon payment of

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the sum due the bank, the bonds deposited were delivered up. After the bonds had been obtained, G and the plaintiff called on the defendant to inquire why the check had not been paid, and the defendant admitted his promise to pay, but said he was too smart to pay that check, and had procured the bonds without paying more than the bank's advances. On a suit brought against the defendant by the plaintiff, HELD:

1st. That it was not necessary, to create an obligation on the part of the defendant to pay the plaintiff the amount of the check, that the consideration should proceed *directly* from the plaintiff or the promise be made directly to him. Such a promise to one for a third party, is to be deemed made to the third party, if adopted by him, although he was not cognizant of it when it was made.

2nd. That the prejudice of the plaintiff by the delivery of the bonds was a sufficient consideration to support the defendant's promise, whether the latter was benefited by the transaction or not.

3rd. That this case was clearly within the well-known exception to the operation of the *statute of frauds*, that "wherever the main purpose and object of the promisor is, not to answer for another but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another."

The rule that there must be an extinguishment of the first debt as a consideration of the new promise, applies only to that class of cases where the creditor's relinquishment of the first debt is the motive of the promise. It does not apply to cases where other inducements are held out such as the assignment of property, or relinquishment of liens, in consideration of which the promisor undertakes to pay the debt of another.

WITNESS, COMPETENCY OF: RELEASE.—The plaintiff, in order to render G a competent witness, during the trial executed a release to him, reserving the "right to proceed against any and all other parties who may in any manner be liable," HELD:

That such release rendered G competent if he was before incompetent, without prejudice to the right of action of the plaintiff.

APPEAL from the Superior Court of Baltimore City.

The facts of this case are stated in the opinion of the Court.

The cause was argued before BOWIE C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

Andrew S. Ridgely & R. J. Brent for the appellant.

Every contract, written or verbal, not under seal, requires

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a consideration to support it and give it validity. *Smith's Law of Cont.*, 3 *Am. Ed.*, *pp.* 70 *and* 129. *Story on Cont.*, *sec.* 426, &c.

Not only must there be a consideration, but a valuable consideration—emanating from some injury or inconvenience to one party or some benefit to the other party. *Story on Cont.*, *sec.* 429, 3 *Am. Ed.* 2 *Black. Com.*, 297. *Smith on Cont.*, 169, 3 *Am. Ed.*

But the performance of an act which it was before legally incumbent on the party to perform, is in law a "worthless and insufficient consideration." For instance:—"If the master of a ship promise his crew an addition to their fixed wages in consideration of and as an incitement to their extraordinary exertions during a storm, this promise is *nudum pactum*—the voluntary performance of an act, which it was before legally incumbent on the party to perform, being in law a *worthless and insufficient consideration.*—*Chitty on Cont.*, 5 *Am. Ed.*, 1842, *p.* 51. *Newman vs. Waters*, 3 *Bos. & Pul.*, 615. *Calligan vs. Hallett*, 1 *Caines.*, (*N. Y. Rep.*) 104.

Again.—A debtor being bound by law to give up the title deeds of an estate to a purchaser pursuant to a decree of sale, enters into an agreement with the purchaser to deliver them to him on payment of a sum of money, the debtor is not only without any right of action for enforcing such an agreement, but if the money is paid, he is himself subject to an action for the recovery of it back. In all such cases the parties are bound to do the acts in question without compensation or reward. *See Addison on Cont.*, 2 *Am. Ed.*, 13 *and* 14, *and cases cited. See also Jones vs. Waite*, 5 *Bingham N. C.*, 191.

The Court erred in granting the plaintiff's prayer, and in rejecting the defendant's 1st, 3rd, 5th and 7th prayers.

1st. Because there was no privity of contract existing between the plaintiff and defendant.

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2nd. Because of want of consideration for the alleged promise.

3rd. Because the alleged promise was to pay to the plaintiff a pre-existing debt due to him from another person, and was not in writing, but verbal, and no action can be sustained by the plaintiff on such verbal promise.

What is the object of this action? It is to recover the amount of a check drawn in favor of the appellee on the Franklin Bank of Baltimore, by one McGinn, a stock and bill broker, for the amount of the proceeds arising from the sale of a promissory note entrusted by the appellee to the said McGinn for sale, sold by the said McGinn, but the proceeds of which sale instead of being paid over to the said appellee, were by the said McGinn dishonestly appropriated to his own use.

While, for the purposes of the present argument, it is not admitted that there were two distinct considerations which admit of severance, nor insisted on the other hand that the consideration is entire, and must be regarded as wholly good or wholly bad; yet this is a matter for the consideration of the Court. *See Story on Cont., secs.* 480, 481, 482.

It is at the same time most emphatically urged and contended, that be the condition severable or not, be it wholly good or wholly bad, whatever else it may be capable of, it is not capable of sustaining an action in the name of the appellee. It did not move from him, but passed directly from McGinn. The promise was not made to him, it was made to McGinn—the appellee was in no wise privy thereto. To the signing and delivery of said orders he was a stranger. When he took the check he knew there was no money in bank, but McGinn did not pledge any particular bonds as security for its payment, he simply told the appellee that he "had some State bonds which he would deposit with the bank, *or other securities*, or *something else*, to make his check good." The check when presented was dishonored,

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the bank persistently refused to pay it on the security of said bonds. The delivery of the bonds, therefore, to the appellant on McGinn's order, occasioned no loss, trouble or inconvenience to, or charge upon the appellee. He neither was present at, nor assented to the agreement made between the appellant and said McGinn, and he cannot recover in this action. *Story on Cont.*, *sec.* 450, *&c.*, 3 *Ed. Powel on Cont.*, *p.* 344. *Owings vs. Owings*, 1 *H. & G.*, 487, 488.

Upon the question whether a person can sue upon a promise, even though it be professedly for his benefit, where he is an entire stranger to the consideration, that is, has taken nothing of trouble or charge upon himself, or occasioned any benefit to the promiser, but such trouble has been sustained or advantage conferred by a third person, the cases seem to have been contradictory, though it is a recognized rule of law that the consideration for a promise must move from the plaintiff. The contract is in such cases binding, there being sufficient consideration, and the difficulty is, who should be made the plaintiff—the party with whom the agreement was made, and from whom the consideration moved, or the party meant by him to be benefited, and for whose advantage the act stipulated for is to be performed? It is clear that if the promisee be a mere agent for the person to be benefited, the latter may sue upon the agreement, though not known at the time to be interested therein. But if no such agency exists, there seems to be great difficulty in permitting an entire stranger to the consideration to enforce the performance of the contract by action in his own name. *Chitty on Cont.*, 53, 54, *Am. Ed.*, 1842. *Addison on Cont.*, 940, 941.

From the case of *Price vs. Easton*, cited in illustration of the above examples, it may be seen that not only must there be a consideration moving from the plaintiff to the

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defendant, but there must be shown a privity between them, the plaintiff must have known of the arrangement, and the promise must have been made to him. *Price vs. Easton*, 4 *Barn. & Adol.*, 433, (24 *Eng. C. L. Rep.*, 96.) *Addison on Cont.*, 940. Very slight circumstances are, however, sufficient to connect the consideration with the promise so as to enable the promisee to maintain an action thereon. If the act or service, for example, forming the consideration for the defendant's promise to the plaintiff, has been rendered to the defendant at the instance and request, and through the instrumentality or procurement of the plaintiff, it has been held that the consideration moves from the plaintiff so as to enable him to maintain an action upon the promise. *Addison on Cont.*, 491. *Eastwood vs. Kenyon*, 11 *Adol. & Ell.*, 452.

If there is a benefit to the defendant and a loss to the plaintiff consequential upon, and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient cause or consideration moving from the plaintiff to enable the latter to maintain an action to recover compensation. *Addison on Cont.*, 492. *Schemerhorn vs. Vanderheyden*, 1 *Johns.*, 139. *Blymire vs. Boistle*, 6 *Watts*, 182. *Owings vs. Owings*, 1 *H. & G.*, 484.

If there be a privity between the parties, either party, indifferently, may bring the action. Thus, where the plaintiffs were creditors, and the defendants were debtors of T, and by consent of all parties an arrangement was made that the defendants should pay to the plaintiffs the debts due from them to T, it was held that the agreement was for a sufficient consideration. *Story on Cont.*, *sec.* 450. *Wilson vs. Coupland*, 5 *Barn. & Ald.*, 228. So a privity of contract will be implied when the promise or agreement is made in the presence of the third person, with his assent. *Lilly vs. Hays*, 5 *Adol. & Ell.*, 550. *Story on*

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Cont., *secs.* 450, 454. And while it is contended as a general rule to be unquestionably true that no person can maintain an action on an agreement to which he is not a party, it is at the same time acknowledged that there are certain exceptions to the rule. If a contract be made with an agent or attorney, or one holding towards the plaintiff a position analagous to that of agent or attorney, the principal may sue in his own name. *Chitty on Cont.*, 54, *and note T; also p.* 615. If money is delivered by A to B for the purpose of being paid over to C, the latter may maintain an action against B for the money; or, if goods are so delivered with the understanding that they are to be turned into money, and the proceeds applied in the same way, this would be an exception to the general rule. *Story on Cont.*, *secs.* 451, 454. Or, if the promise is not special, but general in its character, the assent of the third party may make him constructively a party thereto. *Treat vs. Stanton*, 14 *Conn.*, 445. Or, if the promisee be not beneficially interested in the performance of the promise, and the party beneficially interested therein be the party to whom it is to be performed, the last may maintain the action—or, if he be the meritorious cause of the promise. 1 *Ch. Pl.*, 2 *and* 4.

These, it is apprehended, are all the material exceptions that can fairly be deduced from the adjudged cases; and the only difficulty consists in not carefully considering and fully analyzing the cases which are within the rule, and those which are within the exceptions, and comparing the one class with the other. *See Lawrence vs. Fox*, 20 *N. Y.*, (6 *Smith*,) 268. *Hind vs. Holdship*, 2 *Watts*, 104. *Hall vs. Marston*, 17 *Mass.*, 579. *Carnegie vs. Morrison*, 2 *Met.*, 401. *See also Lilly vs. Hays*, 5 *Adol. & Ell.*, 550. *Story on Const.*, 451. *Dutton vs. Poole*, 1 *Vent.*, 318. *Treat vs. Stanton*, 14 *Conn.*, 446. *Blymire vs. Boistle*, 6 *Watts*, 182. 2 *Am. Le. Ca.*, 165. *Owings vs. Owings*, 1

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H. & G., 485. *Mellen vs. Whipple*, 1 *Gray.*, 317. 2 *Am Le. Ca.*, 167.

For a full review of the authorities upon this much embarrassed question the Court is referred to the notes to *Vadaken vs. Soper. Depeau vs. Waddington*, 2 *vol. Hare and Wallace's Am. Le. Ca.*, 159, 160, 161, 163, 164, 165, 166 *and* 167. It is insisted upon that the present case is within the rule and not within the exceptions. The promise was made not to the appellee but to McGinn; the consideration, if there was any sufficient consideration in the case, moved from the latter, and he was beneficially interested in the performance of the promise, for by that performance he would have been relieved of all liability on the check given by him to the appellee.

Lastly, it is contended that the alleged promise was to pay to the plaintiff a pre-existing debt due to him from another person, and being verbal, and not in writing, no action can be maintained by the plaintiff on such verbal promise. *Stat. of Frauds, sec.* 4. *Burge on Suretyships*, 20.

"This statute," says Mr. Brown, (*Brown on Statute of Frauds, sec.* 188,) "applies to promises to pay the debt of another, and this is construed by the Courts, both of England and this country, to mean the debt of some person other than the immediate parties to the contract of guaranty." And as authority for this statement he refers to *Eastwood vs. Kenyon*, 11 *Adol. & Ellis*, 438. *Colt vs. Root*, 17 *Mass.*, 229. *Mersereau vs. Lewis*, 25 *Wend.*, 243. *Weld vs. Nichols*, 17 *Pick.*, 538. *Barker vs. Bucklin*, 2 *Denio*, 45, the case of *Hardesty vs. Jones*, decided by the Court of Appeals of this State, 10 *Gill & John.*, 404, and other cases.

This is undoubtedly sound law and a proper construction of the statute. Where the debtor sues on a promise made by the defendant to him to pay his debt to a third party, the statute of frauds does not apply, and the promise

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need not be in writing, as was the case of *Eastwood vs. Kenyon*, 11 *Adol. & Ell.*, 438, because the promise, as between the said plaintiff and defendant, is an original undertaking, and not a promise to answer for the "debt, default or miscarriage of another." But where the creditor, the third party to whom the debt is due, sues, it is on an alleged promise on the part of the defendant to pay the debt of another person, that is to say, to answer for the debt due to the plaintiff from another, a third party, other than the defendant, and to this latter case the statute does apply, and the promise must be proved to be in writing. This has been expressly ruled in a recent case decided by the Supreme Court of Pennsylvania. *Shoemaker vs. King*, *Penn. State Rep.*, (4 *Wright*,) 107. "It is an attempt," in the language of the Court of Appeals of this State, "to establish by oral proof a promise to pay the debt of another contrary to the statute of frauds. It is an effort on the part of a creditor seeking to charge a third person with a debt already due to him from another, an effort to establish orally two subsisting liabilities to the same person for the same debt, which is clearly prohibited by the statute." *Jones vs. Hardesty*, 10 *G. & J.*, 417, 418. *Sloan vs. Wilson*, 4 *H. & J.*, 329. *Andre vs. Bodman*, 13 *Md. Rep.*, 254.

"Where the original debt is destroyed or discharged by the new parole agreement, the statute does not in general apply, otherwise it does, and the promise or agreement must be in writing. *Chitty on Cont.*, (*Ed.*, 1842,) *pp.* 513, 515, 615, 616. *Browning vs. Stallard*, 5 *Taunt.*, 450. *Caperton vs. Grey*, 4 *Yerger*, 563. *Andre vs. Bodman*, 13 *Md. Rep.*, 242. *Elder vs. Warfield*, 7 *H. & J.*, 396, 397.

Supplemental Points.—The release executed by Schaefer, the appellee, to McGinn, destroys his right of action against Small, the appellant, and hence there was error in refusing

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the first and third prayers of the appellant and in granting the appellee's prayer, ignoring the effect of the release. The only privity that existed, or could exist, between the appellant and appellee, grew out of the check and its payment, and that privity has been destroyed, to the injury of appellant, by the release of McGinn, the maker of the check.

The agreement of the appellant must be either an original undertaking to pay the appellee the debt represented by the check, in which case, as the debt evidenced, by the check, has ceased to exist, by the effect of the release, the undertaking cannot be performed ; or a collateral undertaking, to pay a pre-existing debt, in which event, as the pre-existing debt has ceased to exist, the collateral undertaking must fall ; and in addition, all collateral undertakings, to pay the debts of another, are within the 4th Section of the Statute of Frauds.

The obligation of Small to pay McGinn's check cannot be greater than if he had specially endorsed it, or greater than if McGinn had drawn upon him and he had accepted it, in fact his obligations under the circumstances are much less. If he had contracted as the acceptor of a draft, or the accommodation endorser, or the joint maker, of a note, the release of McGinn would clearly discharge him; and can he be held to a stricter accountability? *Story on Bills of Exchange, sec.* 433. *Booth vs. Campbell,* 15 *Md. Rep.*, 574.

I. Nevitt Steele, for the appellee.

The prayer of the appellee and the third, first and seventh prayers of the appellant present the following questions for the consideration of the Court.

1st. Was there any consideration for the promise of the appellant ?

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2nd. Was the appellee barred from a recovery by the want of privity of contract with the appellant?

3rd. Was the appellant's promise void under the statute of frauds, because it was not in writing?

1st. It is contended for the appellee that the promise of the appellant was made on a sufficient and valuable consideration. That consideration, as shown by the evidence, was an order, divided at the request of the appellant into two orders, for the delivery of five State bonds of $1,000 each, and the orders were given and received, and the bonds obtained by means of them. Of these bonds, two were not even claimed to be the property of the appellant or of Jenkins whose name he caused to be inserted in one of the orders. These two bonds, of themselves, and without aid from the three others, constituted a valuable consideration. Nor was their efficacy in this respect affected by the alleged title of the appellant to the other three bonds. He probably learned on the evening of April 24th that the five bonds were deposited in the Franklin Bank; on the morning of the 25th he claimed three of them of the bank, and was informed that they could not be delivered without an order from McGinn, and he then went to Govanstown, and there with full knowledge of his own claim to the ownership of the three bonds, made the promise, on which the action is founded, in consideration of the orders for the delivery of the whole five. There was therefore no deception practiced on him in reference to the three bonds, and he obtained precisely what he had bargained for.

But he had not the legal title to the three bonds. They were purchased by McGinn in New York on his own account, and the legal title to them was in him. They were not by any means clearly identified, as the three bonds bought by McGinn in New York, in fulfillment of his contract with the appellant, and even if they had been, they were McGinn's until delivery had been made to the appel-

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lant. Even if the appellant could have established his claim to these particular bonds as against McGinn, still as they were negotiable by delivery, they were McGinn's as to all the world who dealt with him innocently in reference to them. If he held them, merely as agent for the appellant, then the principle applies, that every agent who is entrusted with notes or other securities endorsed in blank, so that they pass by delivery, is authorized to use and transfer them as he pleases, in dealing with those who are ignorant of the agency.

Further, the bonds had been deposited in bank and advances made upon them; they had been equitably pledged to the appellee for payment of the post dated checks received by him; and the appellant's claim to them specifically, was at least doubtful. Under these circumstances the acquisition of an undoubted title to them, and the obtention of possession, constituted a valuable consideration. 1 *Pars. on Cont.*, 369. *Kent vs. Lyles*, 7 *G. & J.*, 73. *Longridge et al., vs. Dorvil et al.*, 5 *Barn. & Ald.*, 117.

2nd. It is contended for the appellee that his recovery in this case is not prevented by want of privity of contract between him and the appellant. Because the bonds having been deposited with the bank, as security for the payment of the check held by the appellee, he had a lien upon them, and therefore the consideration for the promise of the appellant in great part passed from him, the appellee, and he was not a stranger to it. Even if this be not so, he was at least so connected with the transactions out of which our action arises, that he cannot be regarded as a stranger to the consideration. If he was not a stranger to the consideration, then there was privity and our action is maintainable. 1 *Pars. on Cont.*, 389.

Even if the appellee is to be regarded as in no sense connected with the consideration, this action is properly main-

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tainable, because when a promise upon valuable consideration is made to one to pay money to another, that other may sue and recover upon it. This proposition is established by the clear weight of authority in this country and in this State.

The existence of privity between two parties in reference to a particular transaction, is a question of law, and the law constantly implies privity to further the ends of right and justice. If money is paid to one who in consideration thereof agrees to pay it to a third person, it is everywhere conceded, that an action by such third person for money had and received will lie. Here the law implies or makes the privity. If the same promise is made on a transfer or delivery of stocks, goods or other property, why should not privity be equally implied to support an action on such promise? There is no rational ground for a distinction between the two cases. *Clopper vs. Union Bank*, 7 *H. & J.*, 92–104. *Owings vs. Owings*, 1 *H. & G.*, 384. *Arnold vs. Lyman*, 17 *Mass.*, 400. *Carnegie vs. Morrison*, 2 *Met.*, 381. *Hind vs. Holdship*, 2 *Watts*, 104. *Brewer vs. Dyer*, 7 *Cush.*, 337. *Schemerhorn vs. Vanderheyden*, 1 *John's. Rep.*, 140. *Barker vs. Bucklin*, 2 *Denio*, 45. *Del. & Hudson Canal vs. Westchester Bank*, 4 *Denio*, 97. *Lawrence vs. Fox*, 20 *N. Y.*, (6 *Smith*,) 268.

3rd. The promise of the appellant was not made void under the statute of frauds, by the fact that it was not in writing.

Because it was an original and not a collateral promise. 1 *Parsons on Contracts*, 497–498. 2 *Id.*, 305–306. *Allen vs. Thompson*, 10 *N. H. Rep.*, 32. *Hilton vs. Dinsmore*, 21 *Maine*, 410. *Nelson vs. Boynton*, 3 *Met.*, 396. *Elder vs. Warfield*, 7 *H. & J.*, 391. *Brown on Statute of Frauds*, *sec.* 166. *Andre vs. Bodman*, 13 *Md. Rep.*, 254.

And because it was not made to the person to whom the party undertaken for was liable. *Eastwood vs. Kenyon*,

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11 *Adol. & Ell.*, 438. *Hargreave vs. Parsons*, 13 *M. & W.*, 561.

4th. The fifth prayer of the appellant was properly rejected by the Court below.

Because there was no evidence in the case upon which the jury could find that the promise of the appellant was founded exclusively on the consideration of the order for the delivery of the two bonds to Jenkins. On the contrary the evidence is uncontradicted, that the promise was made in consideration of the order or orders for the delivery of the five bonds; and also because the obtention of the possession of the three bonds claimed by the appellant, did, under the circumstances of the case, constitute a consideration.

Bowie, C. J., delivered the opinion of this Court.

McGinn, a broker, being indebted to the appellant for money advanced to be invested in bonds, and to the appellee for money had and received to his use, gave the appellee his check, post dated April 22nd, 1861, for $1,397.50, on the Franklin Bank of Baltimore, stating at the same time he had some State bonds or other securities which he would deposit with the bank to make his check good. Subsequently, he deposited five State bonds of $1,000 each with the cashier of the bank. After the deposit, the bank overpaid checks of McGinn to the amount of $890, but refused to pay his check to the appellee.

Three of the bonds deposited had been purchased upon the order of the appellant, with funds advanced by him, but never delivered to him, yet marked in pencil, with the initials of appellant. These bonds were transferable by delivery, and from aught that appears, neither the bank, nor the appellee were aware of the appellant's claim to a part of them. McGinn failed a few days after depositing

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the bonds in bank. When the appellant called on him, McGinn told the appellant, the bonds were pledged with the bank to secure the overpayment and check to the appellee; upon which the appellant proposed, if McGinn would give him an order for the five bonds, he would make good the amount due on them to the bank, and also pay McGinn's check to the appellee, to which McGinn agreed. The appellant presented two orders, one in favor of himself for three bonds; another in favor of Robert Jenkins for two, which were signed and delivered to the appellant. Upon presentation of the orders and payment of the $890, the bonds deposited were delivered. After the bonds had been obtained, McGinn and the appellee called on the appellant, to inquire why the check had not been paid, and the appellant admitted his promise to pay, but said he was too smart to pay that check and had procured the bonds without paying more than the bank's advances.

The appellee sued the appellant. At the trial it was agreed, "all errors in pleading are waived, and *either party may offer in evidence and have the benefit of any special matter, in the same manner as if it had been specially pleaded.*"

The appellant excepted to the prayer granted by the Court, at the instance of the appellee, and the rejection of the 1st, 3rd, 5th and 7th prayers offered by himself. The verdict and judgment being against him, he prayed an appeal.

The questions raised upon these exceptions are:

1st. Was there a privity of contract sufficient to entitle the appellee to sue?

2nd. Was there a consideration for the supposed contract of the appellant?

3rd. Was the contract within the statute of frauds?

The appellant's 5th prayer raises the separate question

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of want of consideration, unless the appellant's undertaking was founded on the delivery of the order to him in favor of Jenkins, which may be considered a branch of the 2nd point.

The prayer of the appellee, being founded on all the facts, assuming them to be proved to the satisfaction of the jury, it became the duty of the Court, to decide whether the law, under the circumstances, would oblige the appellant, to pay to the appellee the amouut of McGinn's check. It is not necessary to create such an obligation, that the consideration should proceed *directly* from the plaintiff or the promise be made *directly* to him. The result of the more modern decisions is clearly condensed by Professor *Parsons* in his *Law of Contracts*, title "*Consideration.*" After stating the ancient doctrine based upon English authorities, he says: "In this country, the right of the third party to bring an action on a promise made to another for his benefit, seems to be somewhat more positively asserted, and we think it would be safe to consider this the prevailing rule with us. * * * Such a promise is to be deemed made to the third party, if adopted by him, although he was not cognizant of it when made. 1 *Parsons on Contracts*, 466, 467, 468.

SHAW, C. J., in the case of *Carnegie vs. Morrison*, 2 *Metcalf*, 402, after reviewing the English and American decisions, lays it down as settled in Massachusetts, ever since reports of cases have been published, that "when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." This position, he says, is sustained by citations from *Comyn's Digest* and *Rolle's Abridgement*.

BIGELOW, J., delivering the opinion in *Brewer vs. Dyer*, 7 *Curtis*, 340, refers to *Carnegie vs. Morrison* in these

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terms: "In the latter case, all the authorities are fully reviewed in the opinion of the Court, and the rule of law clearly vindicated and established. It does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate; *Dutton vs. Poole*, 1 *Vent.*, 318. 2 *Walford on Parties*, 1144, nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself the agent of the plaintiff; by COLERIDGE, J., in *Lilly vs. Hays*, 5 *Ad. & El.*, 551; but upon the broader and more satisfactory basis, that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. 7 *Cush. Rep.*, 340.

In *Owings vs. Owings*, 1 *H. & G.*, 484, this Court adopt the principle, "that where one person makes a promise to another for the benefit of a third person, the third person may maintain an action on such promise," but in that case there was no new consideration for the promise, by the defendant, to pay the commissions to the children, but a mere promise to pay a pre-existing debt, due to the mother, to the children, without showing any interest on their part in the subject matter of the promise, beyond the relation of parent and child.

The case of *Kent & Lyles*, 7 *G. & J.*, 76, shows that a verbal promise to pay a claim of another against the promisee, may be sustained by the substitution of a note by the promisee for his alleged acceptance to the promisor. It was held that "under all the circumstances of dispute and anticipated difficulty, in relation to the acceptance, the adjustment of them all, by giving the note for the amount claimed by the defendant, was sufficient consideration for the agreement to indemnify."

The appellant's second objection is, that there was no

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consideration for the promise, unless the jury find that the appellant, in consideration of receiving the order for two bonds, in favor of Jenkins, promised McGinn he would pay the appellee the amount of McGinn's check to him.

This point embraces the appellant's third and fifth prayers, the former being a denial of any consideration, the latter, a qualified or special denial.

The absence of all consideration is based upon the argument, that as to three of the bonds, those were purchased with appellant's funds, and had an ear mark upon them which made them the property of the appellant, and being entitled to his own, their delivery to him constituted no consideration for his promise, and as to the two other bonds these being delivered to Jenkins, did not enure to the appellant's benefit, and were alike inoperative as a consideration.

If the evidence of the agreement between the appellant and McGinn, is assumed to be true, (which for the purpose of these prayers is inevitable,) the contract was one and indivisible; one consideration and one promise. The parties contracted for the delivery of *five* bonds, in consideration of which, the checks for which they were pledged were to be made good. Small thus sanctioned the act of McGinn. The subsequent division of the bonds between himself and Jenkins was entirely the act of the appellant. It was improper to grant an instruction upon a hypothesis foreign to the facts. Its tendency would have been to mislead. The entirety of the consideration made it immaterial what claims the appellant set up to a portion of the bonds. If he had claimed the whole, the adjustment of his claims upon McGinn, and avoidance of all further litigation to secure them, was a sufficient consideration to sustain his promise to pay the claim of the appellee; the latter being prejudiced, and the former benefited, in proportion to their respective claims upon the bonds.

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If the delivery of the two bonds to Jenkins was for the exclusive benefit of the latter, that advantage was obtained to the prejudice of the appellee, in consequence of the appellant's promise, and whether he profited by the transaction or not, his obligation to perform that promise was the same in law. It results from these premises, that the prayers of the appellant denying the existence of a consideration for his promise wholly or in part, were properly rejected.

The third and last point arises on the appellant's seventh instruction, which affirms that if the jury find that the defendant, in consideration of the delivery of five bonds named in the evidence, *verbally* promised to McGinn to pay his pre-existing debt to the plaintiff, then the promise is void and no action can be sustained thereon.

This prayer invokes the protection of the 4th section of the Stat. 29, Chas. II.

The facts bring the case clearly within the well known exceptions, to the operation of that statute. "Wherever the main purpose and object of the promisor, is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise, to pay the debt of another." 3 *Pars. on Cont.*, pp. 24, 25. *Nelson vs. Boynton*, 3 *Met.*, 396. Thus in *Jones vs. Hardesty*, 10 *G. & J.*, 404, the main purpose of the firm being to procure the waiver of objections of a surety of a debtor, to an assignment of assets for the benefit of the firm, the verbal obligations of the firm to pay the debt due by the principal to Mr. Harwood, in consideration of that waiver, an assignment was held not within the statute. 3 *Met.*, 396. 7 *Cush.*, 136, 11 *G. & J.*, 418; vide also opinion of SHAW, C. J., *in Alger vs. Serville*, 1 *Gray*, for a very lucid exposition of the words "debt of another," referring with approbation to 11 *Ad. & Ell.*, 446. To the same effect is the case of *Andre vs.*

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Bodman, 13 *Md. Rep.*, 254, where a number of cases from *Williams vs. Lefer*, 3 *Burr*, 1886, to *Elder & Warfield*, 7 *H. & J.*, 396, are cited to sustain the same principle. The observation following the enumeration of certain cases, viz: "The cases show that there must be an extinguishment of the first debt, as a consideration for the new promise," applies only to that class of cases where the creditor's relinquishment of the first debt is the motive of the promise. It does not follow of course, where other inducements are held out, such as the assignment of property or relinquishment of liens, in consideration of which the promisor undertakes to pay the debt of another. In *Jones vs. Hardesty*, the first debt was not relinquished, but retained and held by another up to the time of injunction. "It is not an attempt to establish orally two subsisting liabilities for the same debt, to the same person, but a new and original obligation springing out of new considerations.

The point raised in the appellant's supplemental brief as to the effect of the release to McGinn, executed by the appellee during the trial, does not appear to have been raised below; it escaped the attention of the counsel in the preparation of their original elaborate briefs. Inasmuch as the release was not offered in evidence, or incorporated in the bill of exceptions, it is by no means clear that this Court can entertain the inquiry. Without an inspection of the paper it would be impossible to pronounce any opinion as to its legal effect. Since the argument, however, the counsel have by consent furnished a copy of the release, which on inspection appears to have been so qualified in its terms as to operate only to discharge McGinn from liability to the appellee, reserving "the right to proceed against any and all other parties, who may in any manner be liable," etc., which, in the opinion of a majority of the Court, rendered McGinn competent, if he was before incompetent, without prejudice to the right of action of the appellee.

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Finding no error in the rulings of the Court below, the judgment will be affirmed.

Judgment affirmed.

(Decided March 3rd, 1866.)

T. F. TROXALL, WILLIAM KEYSER AND H. J. KEYSER *vs.* WILLIAM APPLEGARTH AND JOHN WHITTINGTON, GARNISHEES OF SAMUEL R. DUNNOCK.

EVIDENCE: PRACTICE.—Where a witness states that a party took possession of a vessel under a bill of sale, it is proper that the bill of sale should be produced.

——: ——: ATTACHMENT: DEBTOR AND CREDITOR: FRAUDULENT CONVEYANCE. The plaintiffs laid an attachment in the hands of a garnishee on the 21st of January, 1860. On the 20th of the same month the defendant had conveyed his interest in a vessel by bill of sale in trust for certain of his creditors, but the trustees did nothing towards the execution of the trust. On the 24th of September, 1859, the defendant had contracted to convey his interest in the vessel to the garnishee for a certain sum, and on the same day made a bill of sale to him of the vessel, under which no title passed, because it was not recorded in conformity with the Act of Congress. By the terms of sale the purchase money was to be paid, not to the defendant, but to the payment of certain debts due by him, one of which was due to the garnishee himself. And evidence was offered to show that the interest of the defendant in the vessel was to be held as collateral security for the payment of this debt, and to indemnify him for the payment of other debts due by the defendant on account of the vessel, which the garnishee assumed to pay, and did pay out of the purchase money. Upon the repayment of these sums to the garnishee by the defendant, the interest of the latter in the vessel was to be reconveyed to him by the garnishee. At the trial of the attachment case, HELD:

1st. That the effort on the part of plaintiffs to show fraud on the part of the defendant, because of the bill of sale and the deed of trust, even if sustained would not avail them, as there was no evidence to show that if the defendant meditated a fraud upon his creditors the garnishee had notice of it, without which he could not be affected by it.

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2nd. That as the plaintiffs had not laid the attachment upon the vessel, but upon the proceeds of sale, they could not sustain their attachment without conveying the sale to and possession of the garnishee.

3rd. That there was evidence to go to the jury to prove that at the time the vessel was sold and delivered to the garnishee, there was a *bona fide* agreement between the defendant and the garnishee, that the latter should, in consideration of the price agreed on, pay certain debts due by the defendant, which were designated by him, amounting in the aggregate to the whole purchase money, and that this agreement was performed by the garnishee, and if the jury so found, this was a good defence to the attachment.

4th. That in this view of the case it was immaterial whether the bill of sale was under the Act of Congress ineffectual to pass the legal title as against the garnishee, as the agreement would be binding upon the defendant and protect the fund from attachment by his creditors.

5th. That as the attachment was laid on the fund in the hands of the garnishee, the right of the plaintiffs to recover must necessarily depend upon the state of the accounts between the defendant and the garnishee, and the effect of the agreement between them at the time the attachment was laid.

APPEAL from the Superior Court of Baltimore City.

The facts of this case are stated in the opinion of this Court.

The cause was argued before BARTOL, GOLDSBOROUGH and WEISEL, J.

Robert J. Brent and *James L. Brent* for the appellants.

The Court in granting the plaintiffs' 1st prayer had declared the unrecorded bill of sale inoperative as a conveyance against this attachment, and this point was properly ruled upon the following authorities in the State of Maryland. 1729, *ch.* 8, *sec.* 5. *Dorsey vs. Smithson*, 6 *H. & J.*, 63. *Clagett vs. Salmon*, 5 *G. & J.*, 346.

The Act of Congress is express, that all bills of sale passing title to vessels must be recorded in the Custom House. See Act of 1850, ch. 27. 9 Stats. at Large, 440. *Brightly's Dig.*, *p.* 833, *sec.* 44.

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This Act is constitutional, and regulates the whole subject of title to vessels under the power delegated to Congress, to "regulate commerce," as appears from the authorities hereinafter referred to.

This Act of Congress requires the title to be recorded in the Custom House, and does not regard the fact of possession by the purchaser of a vessel as any evidence whatever of title in him. *Thompson vs. Van Vechten*, 5 *Ab. Pr. Rep.*, 461. *Robinson vs. Rice & Moore*, 3 *Mich. Rep.*, 240. *Foster vs. Perkins*, 42 *Maine*, 175. *Reeder vs. The George's Creek*, 3 *Am. Law. Reg.*, 236.

It appears on the face of the bill of sale that this vessel had been previously registered in the Custom House, and was therefore liable to the provisions of the Act of 1850.

It will be contended by our adversaries that Congress did not intend to require a recorded bill of sale in cases where the title, as at common law, passed by a change of possession, and where, as in this case, there was notice on the files of the Custom House to creditors by the registration and oath, showing the vessel to be the property of Applegarth.

But it will be seen that this registration only took place on the 26th of September, 1859, two days after the execution of the bill of sale whereby Applegarth became supposed owner. The registration does not affect the transfer of title, but is matter "*ex post facto*" the acquisition of title, and presupposes that the party registering the vessel has already become owner; whereas the Act of 1850, ch. 27, passed by Congress, strikes directly at the transfer itself, unless it be by bill of sale recorded in the Custom House.

By virtue of this last Act, Applegarth had no title to register, and his registration of the "Union State," on the 26th of September, 1859, is no more than if anybody

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else had registered her as his property, and all the cases which may be cited by the appellee's counsel anterior to the Act of 1850, are ignored by its clear and explicit provisions, based on a public policy requiring all transfers of title to be recorded in the Custom House.

Such registration of a ship never was considered at common law as any notice or change of possession sufficient to prejudice the claims of creditors to avoid a bill of sale for fraud. *Robinson vs. McDonell*, 2 *Barn. & Ald.*, 136.

The enrollment is merely to give a national character to the vessel. 7 *Johns.*, 308. *Thompson vs. Van Vechten*, 5 *Ab. Pr. Rep.*, 460.

This third prayer of the plaintiffs could not be legally rejected, as there was evidence from which a jury might have inferred that the vessel was secretly and conclusively transferred by Dunnock to Applegarth for the purpose of covering the said interest from his creditors.

We do not see on what principle Applegarth can be protected in paying over Dunnock's money to his creditors after we had attached it in his hands, unless he can show that he (the garnishee) had become responsible for these debts before the attachment, of which there is no proof. The attachment was necessarily a revocation of the request of Dunnock to pay certain debts of his, and all subsequent payments were "*de son tort.*" We therefore insist that the consideration money of his supposed purchase was not paid up by the garnishee in full at the date of our attachment, and his very attempt to charge against us the two items, amounting to $1,265.42, is evidence of collusion between the garnishee and Dunnock.

But stronger evidence of collusion and fraud was the basis of our third prayer, erroneously rejected, and it will be found in the machinery and contrivance of the bill of sale of the 24th of September, 1859.

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The third prayer of the plaintiffs should have been granted, therefore, even if it had omitted the latter part, which requires the jury to find the additional fact, that possession did not accompany the bill of sale.

If it ought to have been granted without this additional fact it was not prejudiced by requiring the jury to find an additional but immaterial fact. *Windsor vs. McClellan*, 2 *Story's Rep.*, 497, 498.

The authorities establish that the priority of liens will be determined where the subject in controversy is incapable of delivery by superior diligence in giving notice to the party actually in possession or control of the fund. *Judson vs. Corcoran*, 17 *How.*, 612. *Spain vs. Hamilton*, 1 *Wallace's Rep.*, 604.

This principle seems analagous to the assignment or transfer of shares in a vessel by part owner, and is clearly signified to be the law in such cases by Judge STORY. 2 *Story's Rep.*, 497, 498. Therefore, it results that Applegarth had not perfected his title by taking possession under his bill of sale, until at least after the vessel had made a foreign voyage.

The fourth prayer of the plaintiffs should have been granted, because it is based on the same evidence of fraud and collusion which we have discussed in reference to the third prayer. That the fraudulent grantee is chargeable to the attaching creditor, with all money received by him under the void instrument, as profits or otherwise, is established law in this State. 2 *H. & G.*, 26.

If it be said that our prayers were properly refused, because assuming the nullity of Applegarth's bill of sale, yet the title of Dunnock, passed prior to our attachment, to the trustees named in his deed of trust dated 12th of January, 1860, I answer that the appellant, as attaching creditor can avoid that deed because it was not recorded in

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the Custom House, and is therefore inoperative to convey this vessel as well as for the reasons herein stated.

We will now consider the prayers granted at the instance of the garnishee, as follows: Fourth prayer of garnishee. This prayer is obnoxious to several objections: It seeks to bolster up the secret and collusive bill of sale by asserting that although the garnishee received three-fourths of the earnings of the vessel, yet if the jury find that he took possession of said brig as owner of three-fourths at the date of said bill of sale, and received such earnings as such owner, under an agreement made *bona fide*, that he would pay certain debts, and that he has paid said debts, then he is entitled to recoup the debts so paid against said earnings, and the plaintiffs are not entitled to recover on account of said earnings, unless the jury find that the said earnings and the value of said three-fourths interest together exceed the amount of debts so paid. The radical vice in this prayer is the assumption that a secret agreement between the debtor and his vendee can be set up in bar of the creditors if the jury find it to be in good faith, however secret and unknown. Being predicated on a supposed delivery of possession to the garnishee, at the date of the bill of sale, it is clearly erroneous, as there is no proof that the appellee took possession of the brig on that day.

The law is clear, that where an assignment is made for the benefit of creditors who are not parties and who have not notified the assignee that they accept the benefit of the assignment, that it is competent to the debtor to change its terms and appropriate the funds created by the assignment as he may please. 2 *Story's Eq.*, *sec.* 972, *n.* 3, 1036, *a.* 1045,-6,-7. *Drake on Atta.*, *sec.* 673. *Wallwyn vs. Coutts*, 3 *Meriv.*, 707. *Holland vs. Prior*, 2 *M. & K.*, 492. *Garrard vs. Lauderdale*, 3 *Sim.*, 1. *Wilson vs. Carson*, 12 *Md. Rep.*, 73, 74.

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A special fund is created; either the creditors, provided for by the assignment, have a specific lien on the definite and specific fund, or the assignee is personally liable to them. But if the assignor can control the fund and give further directions, neither the specific lien nor the personal liability could exist. The creditors provided for might have ratified the agreement, and obtained the assent of the assignee to hold the fund for them, but until they did so the fund in his hands belonged to the assignor, was subject to his further directions, and of course liable to attachment. *Tiernan vs. Jackson*, 5 *Pet.*, 580. *Story on Bailments, sec.* 210. *Kalkman vs. McEldery*, 16 *Md. Rep.*, 56. *Story on Agency, sec.* 456. *Lane vs. Husband*, 14 *Simons*, 656, (37 *Eng. Cond. Ch. Rep.*)

The 6th prayer affirms the same principle as the 4th, and completely ignores the time of payments as made by the garnishee, but in addition contains and asserts this proposition, that if the garnishee be responsible for the three-fourths value of the brig, he is not chargeable with her earnings, but only with legal interest on the value of the brig. In other words, if he be a faithless trustee, and converted the trust property to his own use, he can be only chargeable with interest on the value of the trust, and is not held accountable for profits beyond the interest, derivable from the use of the trust funds.

The garnishee claims and asserts that he purchased the brig for $7,500. In that case he would simply owe the purchase money, and he could in no way be responsible either for the value of the brig or her earnings, unless he acquired the brig by way of mortgage, in which event he would be responsible for the value of the brig and for her earnings. Yet this prayer, assuming that the garnishee might be responsible for the value of the brig, which is an assumption that she was only conveyed by way of mortgage, yet instructs the jury that they can take no account of the

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earnings of the vessel, and that the tortious trustee is only responsible for legal interest and not for actual profits received.

This prayer erroneously assumes, also, that there was evidence of the garnishee having taken possession of the vessel at the date of his bill of sale; and then attempts to limit the liability of the garnishee to the value of said three-fourths interest, and to exempt him from all liability for the earnings received, which is not only inconsistent with the defendant's 4th prayer, as granted, but with the principle ruled by this Court in 2 *H. & G.*, 26.

The effect of these rulings was practically to overrule the Act of Congress requiring bills of sales to be recorded, for the Court while annulling the bill of sale as a conveyance, allowed the garnishee to evade the Act of Congress, by setting up a pretended possession under the void deed, and which was merely taken as security for claims to amount of $5,000.

William S. Waters & John H. Thomas for the appellee.

The refusal to grant the third prayer of the plaintiffs is the first ground of exception on the part of the appellants. That prayer is as follows: "If the jury find from the whole evidence that the said Dunnock held an interest of three-fourths in the brig "Union State," and that the same was secretly and collusively transferred to the said Applegarth by said Dunnock, for the purpose of covering the said interest from the creditors of the said Dunnock, and further, that no actual, open and visible possession of said brig accompanied and followed the alleged bill of sale offered in evidence and dated the 24th of September, 1859, that the said interest of said Dunnock in said vessel remains liable, and is chargeable under the attachment issued in this case."

This prayer was properly refused because there was no evidence upon which to base it. The plaintiffs proved by

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Abbott that Applegarth went into possession. This is the plaintiffs' own theory of the case. He cannot sustain the attachment without possession. All the other witnesses proved the fact. Moreover the jury might have been deceived by the terms "actual and visible possession," used in the prayer. There is no evidence of secrecy, collusion, or intent to defraud creditors in fact. Nor does the hypothesis of the prayer rest upon the presumption that Applegarth was aware of a secret intent on the part of Dunnock, if such existed.

The second ground of exception is based upon the refusal to grant the fourth prayer of the plaintiffs. This prayer is as follows:

"If the jury find from the whole evidence that the bill of sale offered in evidence, was made with intent on the part of the said Dunnock to hinder, delay and defraud his creditors, and at the time of the execution of the said bill of sale such intent was known to the said Applegarth, then the said bill of sale is inoperative and void as against this attachment, and the said Applegarth is chargeable as garnishee in respect to all moneys had and received by him at the service of said writ of attachment, or since, under and by virtue of said fraudulent bill of sale."

This prayer is liable to the same objection. There is no evidence of fraud in fact in the bill of exceptions. No inference of such an intent can be drawn from the facts of the case. Moreover, the prayer seeks to make Applegarth chargeable "as garnishee in respect to all money had and received by him" in respect of the brig. If he was chargeable with the earnings of the brig, it must be the nett earnings and not the gross receipts.

The next ground of exception is the granting the fourth prayer of the garnishee. The necessity for this instruction on the part of the garnishee grew out of the granting of the first prayer of the plaintiffs. The Court having

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instructed the jury that the bill of sale passed no title as against the attachment, because it was not recorded in the Custom House, this prayer is based upon the correctness of this instruction ; and as there was no fraud in fact, but as the brig came into possession of the garnishee by a *bona fide* agreement, and the garnishee having in good faith complied with the agreement, and paid large sums of money on account of it, the prayer asserts that while he should be charged with the value of the brig and her earnings, yet he should be entitled to recoup what had been so paid by him in good faith against the value of the brig and her earnings, and if there was no excess over such payments there should be no verdict against him.

It is apparent that if the bill of sale in question did pass a good title as against the attachment, and the instruction of the Court was wrong in this respect, the judgment ought not to be reversed, even if the fourth prayer upon the theory of this instruction was improperly granted.

It will be maintained that the first instruction of the plaintiffs was wrong. This instruction is based upon the Act of Congress of 1850. (*Brightly's Digest, pp.* 833, 834.)

1st. This instruction precludes all evidence of notice mentioned in the Act of Congress. It is in evidence by the plaintiffs that the garnishee went into possession, and his attachment concedes possession. Without possession by the garnishee he would not be chargeable in reference to the vessel. The records of the Custom House were sufficient to show title. Anything which would put the party upon inquiry is sufficient notice. Under the Acts of 1729 and 1846, possession is regarded as sufficient evidence of notice. *Ruckman vs. Mott*, 6 *Law Rep.*, 398. *Bryan vs. Hawthorne*, 1 *Md. Rep.*, 519. *Gill vs. Griffith*, 2 *Md. Ch. Dec.*, 270. *Hudson & Warner vs. Vance*, 2 *H. & G.*, 429.

2nd. The plaintiffs are not in position to call in question the bill of sale offered in evidence under the Act of Con-

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gress. The Act names "bills of sale, hypothecations, mortgage or conveyance," as not being valid. The lien by bottomry is excepted. This is an hypothecation. There is no other exception named in the Act. It has been decided, it is true, that admiralty liens by the general maritime law need not be recorded as provided by the Act. That they are neither bills of sale, mortgage, hypothecations or conveyances within the meaning of the Act, and that although not recorded themselves they are good against recorded deeds. But the same cannot be said in regard to the lien of an attachment, a right having force only by State statute. The plaintiffs have no such rights as make their position better than the garnishee's. Whatever right they have is no more a matter of record than that of garnishee, and it is under the statute equally as incomplete and invalid.

3rd. The lien acquired by the service of the attachment like that of a fi. fa. can work no wrong. They do not place those who obtain them in the place of *bona fide* purchasers for value. A mere equity, although secret and unknown to the holders of them, will be good against them. *Taylor vs. Wheeler*, 2 *Vernon*, 564. *Tieman vs. Poor et. al.*, 1 *G. & J.*, 216. *Brundige vs. Poor*, 2 *G. & J.*, 1. *Woods et. al.*, *vs. Fulton & Stark*, 4 H. *& J.*, 329. *McMechen & Sullivan vs. Maggs*, 4 *H. & J.*, 132.

4th. The attachment in this case is not a lien upon the vessel. It is served upon the garnishee, and it affects rights as between the garnishee and defendant. It is neither *jus in re*, nor *jus ad rem*.

5th. The Act of Congress only enables subsequent purchasers, mortgagees, or those who have acquired title equal in dignity to those named in the Act, and who have taken the precaution to pursue the Act. *Thompson vs. Van Vechten*, 5 *Ab. Pr. Rep.*, 461. *Foster vs. Perkins*, 42 *Maine*, 175.

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6th. The policy of these Acts of Congress is the same as that of the Acts of the State of Maryland of 1729 and 1846. When possession passes the Act does not apply. They are merely designed to be a protection in favor of persons who incur responsibilities for want of knowledge of change of title. *Gill vs. Griffith*, 2 *Md. Ch. Dec.*, 270. *Waters vs. Dashiel*, 1 *Md. Rep.*, 455.

7th. The title to vessels can be changed without bill of sale, and in this case it must be presumed that the bill of sale was placed for record in the Custom House office. A certificate of registry was issued which can only be granted upon a bill of sale in the office. *Brightly's Digest, pp.* 828, 319. 1 *Parsons on Mar. Law*, 47, *&c.*

8th. If the bill of sale be void as against this attachment, then all the interest which could have been reached by the attachment passed by virtue of the deed of trust of 12th January, 1860.

9th. The bill of sale of the 24th September, 1859, was from James Hooper, A. R. Wallace, and the defendant, Samuel R. Dunnock, each of whom conveyed one-fourth, and the failure to record the bill of sale could not upon any construction of the law leave but one-fourth of the vessel exposed to attachment. The title of the other three-fourths is in other persons.

10th. The one-fourth interest of Dunnock conveyed by the bill of sale to the garnishee, of 24th September, 1859, was at the same time mortgaged to Didier by mortgage dated August 27th, 1859, and had never been released, and before it was paid off by the garnishee, his bill of sale was recorded. From which it results that the attachment affected an equitable interest only, and the garnishee having subsequently paid the mortgage, has a claim superior to any that can be acquired by the attachment.

11th. To give the Act of Congress the scope contended for would be to give the power to Congress to regulate sales

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and transfers of property to an extent beyond that of regulating commerce, which power was not intended to be assumed by Congress. *Gibbons vs. Ogden*, 9 *Wh.*, 1. *Maguire vs. Card*, 21 *How.*, 248.

12th. The plaintiffs in this case gave in evidence possession under the bill of sale, and the bill of sale itself. They cannot therefore impeach it.

13th. The next ground of appeal is the granting of the sixth prayer of the garnishee with modifications.

This instruction is obscure but its meaning is clear. It is granted, rejecting all of it after the word "but," next after the word "Applegarth," in the third line from the end of the prayer.

The same reasons exist for granting this prayer as are given for granting the fourth prayer.

14th. The Act of Assembly of 1834, ch. 79, sec. 3rd, provides in terms that no "conveyance or transfer" of property, except by recorded deed, shall prevail as against attaching creditors. This language is at least as strong as that used in the Act of Congress of 1850. Yet even symbolical delivery was held to effect a transfer of title as against attaching creditors. *Wells vs. Briscoe*, 3 *Gill*, 406.

15th. Possession of the vessel by the garnishee and the taking out of a register in his own name, gave notice of his title to the appellant, so as to bring the case within the express terms of the exception in the Act. *Baynard vs. Norris*, 5 *Gill*, 468. *Mayor & City Council of Balto. vs. Williams*, 6 *Md. Rep.*, 236, and note, 274. *Williams vs. Banks*, 11 *Md. Rep.*, 198. *Cook vs. Kell*, 13 *Md. Rep.*, 493 *Farquharson vs. Eichelberger*, 15 *Md. Rep.*, 63–73.

16th. Even if the dry legal title to the vessel remained in the defendant, the garnishee paid the purchase money, took possession, and in every way exercised acts of ownership. These circumstances vested in him an equitable title which will prevail as against an attaching creditor. *Black vs. Zach-*

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arie, 3 *How.*, 510 to 513. *Drake on Attachments, secs.* 522, 526 and 527. *Houston vs. Nowland*, 7 *G. & J.*, 480, 493. *Alexander vs. Ghiselin*, 5 *Gill*, 138, 180. *Price vs. McDonald*, 1 *Md. Rep.*, 402 and 414. *Gibson vs. Stevens*, 8 *How.*, 384.

17th. There is no proof that the garnishee ever realized anything from the earnings of the vessel—the agreement between him and the defendant *bona fide* appropriating all he was to pay to certain debts of the defendant is one which the attaching creditors cannot defeat. An attaching creditor can only recover from the garnishee what the defendant could if the action had been brought by the latter. *Poe vs. St. Mary's College*, 4 *Gill*, 499. *Balto. & Ohio R. R. Co. vs. Wheeler*, 18 *Md. Rep.*, 373. *Peters vs. Cunningham*, 10 *Md. Rep.*, 554. *Drake on Attachments*, (*Ed. of* 1858,) *pp.* 382 and 420, §§ 485, 517, *etc.*

18th. The instruction contained in the appellee's fourth prayer, which was granted, entitled the appellant to condemn three-fourths of the value of the vessel and her earnings together, over and above the debts of the appellant, which the appellee had paid in fulfillment of a *bona fide* agreement under which he had received such earnings if he ever received any. This was the utmost of the appellant's rights, in any possible view of the facts, as will be seen by reference to the authorities cited under the last point.—There being no proof that the appellee received any of her earnings, he of course could not be responsible for them; he, and not the appellant, was prejudiced by allowing the jury, as an element of his liability, to find that he had received such earnings.

19th. The appellee's fifth prayer, making the value of the vessel, when he took possession, and interest thereon the limit of his responsibility, ought to have been granted as offered. The proviso, which the Court added, allowed the jury to hold him responsible in their discretion, either

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for the value of the vessel, or her earnings. The appellant will hardly claim that he was entitled to her value when taken possession of, and her subsequent earnings also.

20th. The defendant had himself, before the conveyance to Applegarth, but an equitable interest in the vessel, which could not have been taken under execution, and such interest was not therefore liable to this attachment, specifically or in the hands of the garnishee. *Drake on Attachment*, (*Edition of* 1858,) *pages* 192, 193, 194, §§ 244 245, *and page* 376, §§ 479, 457 *and* 458. *Harris vs. Alcock*, 10 *G. & J.*, 251. *Rose vs. Beavan*, 10 *Md. Rep.*, 467. *Billman vs. Tudor*, 1 *Pick.*, 399.

21st. The Court correctly required the appellant to produce the bill of sale, of which his witness spoke, to show what amount of interest the appellee took possession of and in what capacity he so took it. If it erred, however, in this particular, and its ruling in reference thereto was intended to be the ground of the first exception, the appellant was not prejudiced thereby, inasmuch as the granting of his first and second prayers held that said bill of sale was void as to him, and interposed no obstacle to his right of recovery. *Leffler vs. Allard*, 18 *Md. Rep.*, 552.

GOLDSBOROUGH, J., delivered the opinion of this Court.

The appellants, the plaintiffs below, obtained a judgment against Samuel R. Dunnock, in 1859, for $1,015, and by way of execution issued an attachment out of the Superior Court of Baltimore City on the 20th of January, 1860.

This attachment was, on the 21st of January, 1860, laid on certain alleged rights and credits of the defendant Dunnock in the hands of William Applegarth one of the appellees. He appeared as garnishee, and pleaded *nulla bona*. At the trial, the plaintiffs moved the Court to order a *non pros.* as to John Whittington ; the same was ordered and

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the cause conducted against Applegarth as sole garnishee. At the trial it appeared by the evidence that Applegarth on the 24th of September, 1859, contracted with Dunnock to purchase his interest in the brig "Union State" for $7,500. This interest Dunnock designed to convey by a bill of sale executed on the day of the contract, and embracing three-fourths of said brig.

The bill of sale was signed by James Hooper, A. R. Wallace and Samuel R. Dunnock. It was however not recorded in the Custom House in conformity with the Act of Congress, until the 22d day of February, 1861, and upon the prayer of the appellants, the Court ruled that no title passed to the appellee, Applegarth, by said conveyance as against the attachment.

Besides the bill of sale which the plaintiffs produced by order of the Court, they read in evidence a deed of trust from Dunnock to the appellees, acknowledged on the 20th day of January, 1860, by which he conveyed all his property for the benefit of his creditors according to the terms therein expressed, the plaintiffs stating that they offered it in evidence with the declaration that they would impeach it afterwards. They then proved by Mr. Abbott that the trustees had done nothing towards the execution of said deed of trust.

They further proved by Abbott, that the whole $7,500 stated in the bill of sale, was due to Dunnock for his interest in said vessel, which was really three-fourths thereof, none of which was to be paid by Applegarth to Dunnock, but to be applied by the garnishee to certain debts of Dunnock; that on the day of the date of the bill of sale, Dunnock owed Sterling & Ahrens $4,311.29 on account of said vessel, and had previously given therefor four notes endorsed by W. Applegarth & Son for different amounts at different periods of payment. And also that a note

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dated 14th of September, 1859, for $676.13, endorsed by Applegarth & Son, was given for materials supplied to said vessel, and was also paid out of said purchase money, and that the garnishee was to pay out of the $7,500 any other debts due by Dunnock on account of the vessel. The plaintiffs then proved by Mr. Skinner, that about the time of said sale, Applegarth told him he had a claim against the "Union State" of from $4,800 to $5,000, and held her as collateral security for that amount, and when that was paid, Dunnock was to resume possession, and the brig was chartered at $600 a month, and that he had assumed Dunnock's debts to the amount of $4,800 or $5,000 at that time. The garnishee then proved by Samuel R. Dunnock, that he was the owner of three-fourths of the "Union State" previous to his sale to Applegarth. That the sale took place on the 24th of September, 1859, and on the same day he gave the bill of sale referred to, and at the same time handed over to him all the papers connected with her. That at the time of the sale the brig was in the port of Baltimore, held and navigated by Captain Foxwell, who was one-fourth owner, and master for a voyage then about to commence under the direction of Applegarth, as three-fourths owner, and after that voyage, Captain Martin was put in charge as master by Applegarth. That the consideration for the sale was $7,500, to be applied by Applegarth in payment of certain debts which witness owed on account of the brig, and the balance to be applied to such debts due by Dunnock and Weatherly to Applegarth as witness had assumed; and being shown a statement of sums paid by Applegarth & Son, amounting to $7,451.58, he was asked "if the debts in the said paper enumerated, were those which Applegarth was to pay under the agreement aforesaid, between them?" replied that they were, and that each and all of said debts had

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been passed upon by him as debts to be paid by Applegarth under said agreement, and in addition thereto, the tax bill amounting to $352.22, chargeable to the brig, was to be paid as part of the consideration of sale. That all the bills due upon the brig so to be paid by Applegarth, were mentioned to him at the time of the sale, but the precise amount thereof not being known at that time, was only approximated; and that although the witness was owner of three-fourths of the brig, all the bills for her were charged to him, yet after the sale he was never called upon to pay them.

The witness further stated, that there was a verbal agreement between him and Applegarth, that if Mr. Campbell should return from Venezuela and pay him what he owed him, he would be able to *buy back* the brig for $7,500, in which case he would allow Applegarth 2½ per cent. That on the day of sale, witness went with Applegarth, canceled the insurance in his own name, and Applegarth took out one in his own name. This change of insurance is also proved by Montague, as taking place on the day of sale. Dunnock further testified, that at the time of the service of the attachment, Applegarth did not owe him on account of the brig, or on any account, but that he owed Applegarth. That when the sale was made he handed to Applegarth such bills of lading for the cargo as he had signed.

The garnishee further proved by Mr. Didier that he had sold to Dunnock one-fourth of the brig in September, 1859, for $2,250, and took a mortgage on the brig to secure the payment of $766.08; this claim as appears by the evidence, was paid by Applegarth.

The garnishee proved by his clerk, Mr. Mitchell, that debts of Dunnock to the full amount of the consideration named in the bill of sale, were paid by him.

He then read in evidence the permanent registration of the vessel in his name as three-fourths owner, and Foxwell

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as one-fourth owner, dated the 26th of September, 1859. We now proceed to dispose of the questions arising upon the appellants' exceptions.

1st. The language in which the first exception is stated is somewhat obscure, but we suppose it was designed to raise the question whether the Court below erred in requiring the production of the bill of sale. In our opinion the action of the Court was correct. The witness having stated that the appellee, Applegarth, had taken possession under a bill of sale, it was proper that the paper should be produced, but if this were not so, the appellants were not prejudiced by the Court's action, inasmuch as by their first prayer which was granted, the jury were instructed that the bill of sale passed no title to the grantee, as against the attachment. The correctness of the first prayer depends upon the true construction of the Act of Congress of 1850, upon which able and elaborate arguments have been made, but in our opinion its determination is not material in the decision of this appeal, and therefore without meaning to express any opinion upon that question, we shall assume that the ruling on this point, which was favorable to the appellants, was correct and shall decide the other questions in the case upon the theory that the bill of sale was inoperative to pass the title as against the appellants attachment.

The second prayer of the appellants which was granted, gave to them the full benefit of Skinner's testimony, the effect of which was by that prayer properly submitted to the jury.

The appellants' third prayer.—The effort of the appellants to show fraud in the conduct of Dunnock, because of the bill of sale and the deed of trust is not sustained. Indeed we see nothing in the evidence from which it would be competent for the jury to find any fraud in the conduct in the appellee, nor is there any evidence to show that if Dunnock meditated a fraud upon his creditors, the appel-

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lee had notice of it, without which he could not be affected. See *Waters, lessee, vs. Riggin*, 19 *Md. Rep.*, 536. The third prayer of the appellants was therefore properly rejected. We have said there was no evidence of fraud to justify that portion of the prayer, and the other proposition that if "no actual, open and visible possession accompanied and followed the bill of sale, then the interest of Dunnock in said vessel remains chargeable, and liable under this attachment," is without evidence to support it. The appellants' own witness, Abbott, testifies that Applegarth went into possession. Dunnock testifies that he delivered up the papers connected with the vessel on the day of sale; that on the same day the insurance was changed, and that the appellee had placed Captain Foxwell on board as master, for the voyage about to be commenced. In fact the appellants cannot sustain the attachment without conceding the sale to, and possession of the appellee. They have not laid the attachment upon the vessel, but on the proceeds of sale, and for the same reasons the fourth prayer of the appellants was properly rejected. In granting the fourth prayer of the appellee, and his sixth prayer with the modification, the Court below, in our opinion, correctly announced the law of the case. There was evidence to go to the jury to prove that at the time the vessel was sold and delivered to the appellee, there was a *bona fide* agreement between Dunnock and the appellee, that the latter should, in consideration of the price agreed on, pay certain debts due by Dunnock, which were designated by him, amounting in the aggregate to the whole purchase money, and that this agreement was performed by the appellee, and if the jury so found, this was a good defence to the attachment.

In this view of the case, it is quite immaterial whether the bill of sale was under the Act of Congress, ineffectual to

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pass the legal title as against the appellants; the agreement would be binding upon Dunnock and protect the fund from attachment by his creditors. Here the attachment was laid on the fund in the hands of the appellee, and the right of the appellants to recover, must necessarily depend upon the state of accounts between Dunnock and the appellee, and the effect of the agreement between them *at the time the attachment was laid.* In the case of the *Balt. & Ohio R. R., garn. of Cen. Ohio R. R., vs. Wheeler*, 18 *Md. Rep.*, 378, this Court said "the liability of a garnishee in respect of property of a defendant in his hands, is to be determined, ordinarily, by his accountability to the defendant on account of the property. If, by any pre-existing *bona fide* contract, that accountability has been removed or modified, it follows that the garnishee's liability is correspondingly affected, for it is well settled, that garnishment cannot have the effect of changing the nature of a contract between the garnishee and the defendant, or of preventing the garnishee from performing a contract with a third person."

Judgment affirmed.

(Decided March 13th, 1866.)

HENRY STAYLOR *vs.* RICHARD BALL AND WARREN WILLIAMS.

PROMISSORY NOTES: PRESENTMENT, DEMAND AND NOTICE.—The obligation to make a presentment and demand of payment of the maker of a note extends to the case of a resident within the State (if known to the holder) as well as to a resident of a city.

A personal demand and personal notice being dependent upon the knowledge of the holder of the place of residence or business of the maker and endorser, the Court correctly refused to grant prayers which required a demand of payment of the maker at his residence or place of business, and

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personal notice of non-payment to the endorser, or notice at his place of business without regard to the fact whether the holder or Notary had knowledge of the residence of the maker or endorser respectively, or used due diligence to ascertain the same.

——: ——: WAIVER OF NOTICE is often more certainly indicated by acts than by words.

EVIDENCE: NOTARY'S CERTIFICATE OF PROTEST.—By the Code, Art. 14, sections 6 and 7, the protest itself is *prima facie* evidence of the facts stated therein.

EVIDENCE: PROVINCE OF COURT AND JURY.—What constitutes due diligence upon any state of facts agreed on, or to be proved by the jury, is a question of law for the Court.

NOTICE TO ENDORSER.—An endorser is entitled to strict notice, by which is meant that reasonable diligence shall be employed and reasonable efforts made to give it.

The Notary must resort to all proper parties to the note within his reach; he must apply to the maker of the note if he is known and within reach.

PROVINCE OF COURT AND JURY.—The question of due diligence in this State must be determined by the Court.

APPEAL AND ERROR: PRAYERS AND INSTRUCTIONS TO THE JURY.—This Court has repeatedly held that although there was error in the instruction of the Court below, such error will not be ground for reversal if it appear that the party appealing was not injured thereby.

APPEAL from the Court of Common Pleas for Baltimore City.

The appellees, as endorsees, sued the appellant, as endorser and payee, of a promissory note. The defendant pleaded several pleas, the second of which was that he had not due notice of the dishonor of the note, and the fourth was that no legal demand of payment was made upon the makers.

Exception.—After the trial of the cause the plaintiffs to maintain the issues on their part joined, offered the note and protest in evidence, and proved by *Mr. Stockbridge* that some time after the maturity of the note, offered in evidence in this case, it was placed in his hands by the plaintiffs for collection, as their attorney, and that he had an interview with Staylor concerning it; that Staylor

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admitted the genuineness of the note and his endorsement, and said he had in his possession and would like to return to the plaintiffs in settlement the machine for which the note was given; that if they would take it at a fair price he would pay the difference between such price and the face of the note; that witness said he would communicate with the plaintiffs; that he did so communicate, and the plaintiffs assented to receive the machine on certain prescribed conditions, which the defendant neither accepted nor declined, but did not comply with; that at the first interview spoken of Staylor recognized his liability on the note and promised to pay it, and said in substance that as times were the machine was dead stock or useless to him, and he wished the privilege of returning it in part payment of the note, and would, if permitted to do so, pay the balance in cash, and that he made no objections to the protest, and said nothing of any failure to give him notice of the protest of the note.

The plaintiffs also proved by *Lewis Sutton*, Notary Public, that the note was placed in his hands for protest by C. R. Coleman, Cashier of the Mechanics' Bank; that he could not find the place of business or residence of either makers or Staylor; that he made inquiry and endeavored to learn the residence or place of business of the makers and endorsers; that he consulted the Baltimore City Directory and could find neither therein; that neither Henry Staylor nor Pohl & Spreckelmeyer were in the Directory; that he afterwards inquired at the Mechanics' Bank, from which he received the note, but could get no information with reference to them there; that he had a number of notes to protest on the day the note in question matured, and that he pursued the course mentioned in the protest. The making and endorsement by Staylor of the note were admitted.

The plaintiffs having closed their testimony, the follow-

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ing evidence was offered on behalf of the defendant: It was proved by several witnesses that at the time the note matured, Pohl & Spreckelmeyer, makers, carried on a large steam planing mill at the corner of Cathedral and John streets, in Baltimore city, and had been doing business there for more than a year before the maturity of the note; that they did an extensive business and were known to the business community, particularly to builders, and that Pohl & Spreckelmeyer resided in Baltimore city. That Staylor for the last eight years carried on the hardware business at store No. 95 Harrison street, near Gay, in Baltimore city; that he did an extensive business and trade in builders' hardware; that he never had a sign bearing his name, but the name over his door was "McAleer," and had always been; that he was accustomed to receive letters through the Post Office, addressed to himself in his own name as well as in the name of "McAleer & Co.;" and that a letter addressed to him, or a notice of this protest as was said to be, would, in the regular course of business, be received by him the same day it was mailed or the following morning; that Staylor resided in Baltimore city; that his store was open for business on business days during the year; that notices had at different times been brought to him from the Post Office as well in his own name as in that of McAleer; that the custom in Baltimore city was to give personal notice of the protest if possible to endorsers, and make personal demands for payment if possible on makers where they have known places of business in the city; or if they have not such and cannot be found, to make inquiry of the bank from which the note was received, and to examine the City Directory, and if this does not disclose the residence or place of business of the parties, to make demand in some public place, usually the Post Office and Merchants' Exchange, and to address the notices for the endorsers to them, and to deposit them so addressed in the city Post Office.

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Whereupon the defendant prayed the Court to instruct the jury as follows.

Defendant's first prayer.—The defendant prays the Court to instruct the jury that if they believe from the evidence that at the time the note in question matured, the makers had a recognized and known place of business in the city of Baltimore, and were generally known as conducting an extensive business in steam planing; and shall futher find that on the day of said maturity the Notary Public did not demand payment of said makers, or either of them, of said note, or call at their place of business to make such demand, they must find a verdict for the defendant, although they should believe that the Notary made a demand as stated in the protest.

Defendant's second prayer.—That if the jury believe from the evidence that on the day said note matured, Henry Staylor, first endorser, had a known and recognized place of business in the city aforesaid, and that his store was of widely extended business reputation in said city, and that the Notary Public did not call and notify him personally of the demand and non-payment of such note by the makers, or leave a notice to that effect at the defendant's place of business, and that said place of business was open for the transaction of business on every business day during the year; and that, by the custom of Baltimore city, Notaries are expected to notify endorsers at their places of business or residences, if any they have, they must find for the defendant, although they should believe that notices were sent through the Post Office, as mentioned in the protest.

Defendant's third prayer.—That if the jury believe from the evidence that the defendant, subsequently to the maturity of the note, and when it was placed in the hands of an attorney for collection, offered to compromise or accommodate the amount claimed as due on the face of the note; and should further find that such offer to compromise or

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accommodate was not accepted, that such offer on the part of the defendant is no waiver of his right of defence, as endorser, unless the jury shall further find that at the time of the offer, as above, the defendant knew of his rights of defence, and expressly waived or abandoned them.

Defendant's fourth prayer.—That if the offer, as aforesaid, was made and not accepted, such offer is not evidence to go to the jury under the declaration in this case.

Defendant's fifth prayer.—That if the jury believe from the evidence that the notice purporting to have been sent to defendant, as endorser, was not directed to the defendant at his place of residence or Post Office, and that the protest does not state such fact of direction, or state any place of direction of notice to the first endorser, they must find for the defendant.

Defendant's sixth prayer.—That if the jury should believe from the evidence that the notice purported to have been sent to the defendant did not contain a true description of the note, an assertion that it had been duly presented to the makers at maturity and dishonored, and that the plaintiff would hold and look to the defendant for reimbursement or indemnity, they must find for the defendant.

Defendant's seventh prayer.—That there is no evidence of a notice of the dishonor of the promissory note mentioned in this action, describing the note, asserting that it had been duly presented to the makers at maturity and dishonored, and that the defendant would be held or looked to for remuneration or reimbursement.

Defendant's eighth prayer.—That if the jury believe the makers and endorsers (as was offered in evidence) had known and recognized places of business in the city of Baltimore, and that the Charles R. Coleman, one of the endorsers, lived in the same city, notice of the protest must be personal if possible.

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But the Court below (KING, J.,) rejected all of said prayers, and instructed the jury as follows:

The Court instructs the jury in this case that if they shall find from the evidence that the promissory note offered in evidence was drawn by Pohl & Spreckelmeyer, co-partners, and that they were residents of the city of Baltimore at its maturity, and that the said note was endorsed by the defendant, also a resident of the city, at its maturity, and that upon the maturity of said note it was not paid, and that it was delivered by the Cashier of the Mechanics' Bank of Baltimore to Lewis Sutton, Notary Public, for protest; and that the said Notary used reasonable diligence to ascertain the residences or place of business of the drawers of said note and could not ascertain the same; and if they shall also further find from the evidence that the said Notary did also use reasonable diligence to ascertain the residence or place of business of the defendant, the endorser, and could not ascertain the same, and that on the same day he addressed a written notice to the defendant, informing him of a demand on the said drawers and of non-payment of said note, and that said defendant was held responsible for the payment of the same, and directed said notice to the defendant and deposited the same in the Baltimore Post Office on the same day as set out in the protest offered in evidence, that then the plaintiffs are entitled to recover.

The Court further instructs the jury that if they find from the evidence that the said Notary did not use reasonable diligence to ascertain the residences or place of business of the makers of said note, if residents of the said city at its maturity, then no legal demand in this case has been made on the makers of said note, and the plaintiffs are not entitled to recover, unless they shall further find from the evidence that subsequently to the protest of said note the defendant, the endorser, promised the plaintiffs or their

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attorney to pay the amount of said note, with a knowledge of the fact that no legal demand had been made on the drawers for payment.

The Court hereby further instructs the jury that if they shall find from the evidence that the said Notary did use reasonable diligence to ascertain the residences or place of business of the makers of said note as set out in its first instruction, but did not use reasonable diligence to ascertain the dwelling or place of business of the defendant, that then the notice deposited in the Post Office as aforesaid is not sufficient to hold the defendant, and the plaintiffs are not entitled to recover, unless the jury shall further find from the evidence that the notice so deposited in the Post Office as aforesaid did actually reach the defendant on that or the succeeding day, or unless they shall find from the evidence that subsequently to the day of the protest of said note, the said defendant promised the plaintiffs or their attorney to pay the amount of said note, with a knowledge of the fact that notice of non-payment had not been regularly given to him.

From this action of the Court below the defendant appealed, and the cause was argued in this Court before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

J. Randolph Quinn for the appellant.

The appellant contends that the judgment in this case should be reversed, and assigns as a reason therefor :

1st. That the Court below erred in rejecting the appellant's prayers 1, 2, 5, 6, 7 and 8, because there was no evidence such as is required by law to fix the liability of an endorser; that in fact the evidence showed failure of diligence in that respect. Endorsers should have notice of demand and non-payment; proof of notice must be clear; endorsers

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in same town entitled to personal notice; the protest being only *prima facie* evidence, is not of itself sufficient proof. *Day vs. Lyon*, 6 *H. & J.*, 140. *Moore vs. Hardcastle*, 11 *Md. Rep.*, 486. *Bell vs. Hagerstown Bank*, 7 *Gill.*, 229–231. *Graham vs. Sangston*, 1 *Md. Rep.*, 66–67. *Woodworth vs. Bank of America*, 19 *Johns.*, 391. *Smedes vs. Bank of Utica*, 20 *Johns.*, 372. *Story on Prom. Notes*, 235, 322, 348. As to putting notices in Post Office, see *Farmers' Bank vs. Bowie*, 4 *Md. Rep.*, 495. *Brailsford vs. Williams*, 15 *Md. Rep.*, 150. *Ransom vs. Mack*, 2 *Hill*, 587. *Halliday vs. Martinett*, 20 *Johns.*, 168.

2nd. That the Court below erred in rejecting the appellant's prayers 3 and 4. Waiver of demand and notice must be done understandingly. Failure to accept the defendant's (appellant's) offer conferred no rights on the plaintiffs, (appellees,) which they did not possess before such offer, but left the parties in their original condition. *Cayuga Bank vs. Dill*, 5 *Hill*, 303. *Agan vs. McManus*, 11 *Johns.*, 180. *Griffin vs. Goff*, 12 *Johns.*, 423. *Norris vs. Lain*, 16 *Johns.*, 151.

3rd. That the Court below erred in its first instruction. Diligence is a question of law. *Sasscer vs. Farmers' Bank of Maryland*, 4 *Md. Rep.*, 409. *Bell vs. Hagerstown Bank*, 7 *Gill.*, 231. *Schofield et al. vs. Bayard*, 3 *Wendell*, 488. The whole of this instruction being based on the question of diligence was improperly given to the jury.

4th. The second instruction is bad, for the reason assigned in the 3rd point; and the Court also erred in assuming there was evidence that the defendant promised to pay the plaintiffs, as in said instruction stated—the evidence being that the defendant offered to pay conditionally—not absolutely—and there was no evidence that the conditional offer was accepted by the plaintiffs. On the contrary, the plaintiffs desired to annex conditions of their own to the defendant's offer.

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That Courts cannot assume facts is well settled. The appellant refers to authorities cited under his 2nd point, as elucidating this 4th point.

5th. That the 3rd instruction is bad for the reason assigned by the appellant in his 3rd and 4th points.

H. Stockbridge, for the appellees.

The appellees do not contend that all the propositions contained in the prayers of the appellant are bad as abstract statements of law; but they submit that some of them are not sustained by any facts proven in the case, and others had a tendency to mislead the jury, and it was competent for and the duty of the Judge to lay all aside, under such circumstances, and to give the jury instructions which would not mislead, and which covered all the points in controversy. *Mutual Safety Ins. Co. vs. Cohen*, 3 *Gill*, 459. *Clements vs. Smith's Admrs.*, 9 *Gill.*, 160. *N. Y. Life Ins. Co. vs. Flack*, 3 *Md. Rep.*, 341. *Key vs. Dent*, 6 *Md. Rep.*, 142.

The defendant relied only upon his second plea, viz: that he "had not due notice of the dishonor of said promissory note as alleged;" and the only question in controversy at the time of the giving of the instructions were: 1st, the technical sufficiency of the notice of protest, and 2nd, if sufficient, the force of the subsequent promise to pay.

The plaintiff contended, and contends here, that the notice given to the endorser was sufficient to render him liable to his endorsee. It is not to be expected that in large cities Notaries Public can have a personal acquaintance with all the merchants doing business in such cities. And if promissory notes are made without any fixed place of payment expressed upon such notes, the Notaries can only be required to use earnest diligence and conform to the "custom of merchants" for the discovery of the endorsers and the service of notice.

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In this case the custom of merchants relative to protests in the city of Baltimore, was strictly complied with. And the notice sent to the appellant would, according to the appellant's testimony, reach him on the day of protest or the following morning. The appellees submit that this was due diligence and sufficient notice.

The general rule of personal demand upon the maker and personal notice of dishonor to the endorser is well established; but the exception, which, under certain circumstances, permits the sending of a notice by mail, is equally so. It was clearly declared to be the law of Maryland, in *Walters & Harvey vs. Brown*, 15 *Md. Rep.*, 285; and if any doubt could have existed as to the sufficiency of the demand and notice in the present case before that decision, there certainly can be none since.

But this case is stronger than that of *Walters & Harvey vs. Brown*, in that, in this case, the proof establishes mercantile usage for the demand and sending of notices by mail, and the strict conformity of the Notary to the established usage. *In Gindeat vs. Mechanics' Bank*, 7 *Ala.*, 324, *Chicopee Bank vs. Eager*, 9 *Met.*, 583, and other cases, such usage, although the usage of a single bank, has been held sufficient to bind the maker of a note made payable at such banks. Much more then would a usage like this, adopted by all the banks of a great commercial city like Baltimore, bind persons doing business in such city and through those banks.

But after maturity, the endorser "recognized his liability on the note and promised to pay it." This promise was sufficient to bind him to the payment, for it was evidence of protest for non-payment, and that notice of dishonor had been given. *Gibbon vs. Coggon*, 2 *Camp.*, 188. *Beck vs. Thompson*, 4 *H. & J.*, 531. *Shephard vs. Spates*, 4 *Md. Rep.*, 400.

This promise was made while the promisor had in his

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possession the merchandise for which the note was given. He was therefore in fact the debtor, and his promise could not in any event be regarded as a *nudum pactum*. It is a stronger case than that of an endorser who has received from the maker of a note security for his liability; and even in that case, it is well settled that the endorser cannot avoid payment by the plea of want of notice of dishonor. And this distinction stands in sound reason as well as on authority, for the neglect to give notice cannot have operated to his injury.

From these views it follows, that it is immaterial whether the Court did or did not err in submitting the question of reasonable diligence to the jury. Proper diligence having been exercised, the Court's ruling upon that point must have been against the defendant, and if instead of ruling thus against the defendant, the Court permitted him to attempt to satisfy the jury that proper diligence had not been used, it was an error which could not prejudice the defendant, of which he cannot complain, and for which he cannot ask a reversal of the judgment. It was an error in favor of the appellant. *Anderson vs. Garrett*, 9 *Gill.*, 131. *Keener vs. Harrod, &c.*, 2 *Md. Rep.*, 63. *Pratt vs. Johnson*, 6 *Md. Rep.*, 407. *Marshall vs. Harwood*, 7 *Md. Rep.*, 466. See cases collected in 2*nd Md. Digest*, *p.* 23, *pl.* 131.

Bowie, C. J., delivered the opinion of this Court.

The appellees as endorsees, sued the appellant as payee and endorser of a promissory note dated Baltimore Nov. 8, 1860, drawn by Pohl & Spreckelmeyer at four months for $367, for value received.

The defendant offered a series of eight prayers, all of which were rejected, and instructions given in lieu thereof by the Court, to the rejection and granting of which respectively, the defendant excepted, and prayed an appeal.

The first, second and eighth prayers refer to the demand

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on the maker, and notice of dishonor to the endorser, necessary to make the latter legally responsible.

The first and second prayers require a personal demand of the maker, and personal notice to the endorser, of demand and refusal to pay, if the jury believe the maker and endorser respectively, had a known and recognized place of business in Baltimore, and were generally known, and that by the custom of Baltimore City, Notaries are expected to notify endorsers at their places of business or residences, if any they have, without reference to the knowledge of the holder of the note or Notary Public, of the residence or place of business of the maker or endorser, or of any want of diligence on their part, to obtain such information.

The defendant's third prayer asserts, that an offer to compromise not accepted, is no waiver of the defendants right of defence as endorser, unless the jury shall further find that at the time of the offer as above, the defendant knew of his rights of defence and *expressly* waived or abandoned them.

4th. That if the offer as aforesaid was made and not accepted, such offer is not evidence to go to the jury under the declaration in this case.

The 5th and 6th refer to the form and sufficiency of notice of protest. They affirm, if the notice purporting to be sent to the defendant as endorser, was not directed to him at his place of residence or Post Office, and the *protest* does not state such fact of direction, or any place of direction of notice to the first endorser, or if the notice did not contain a *true description of the note*, the jury must find for the defendant.

The 7th declares, there is no evidence of a notice of dishonor of the note mentioned in this action, asserting it had been presented to the makers at maturity, and dishonored, and that defendant would be held responsible.

The 8th affirms that if the makers and endorsers as afore-

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said had known and recognized places of business in the city, and that Charles R. Coleman, one of the endorsers, lived in the same city, notice of the protest must be personal, if *possible.*

As to notes payable without reference to any particular place, the general rule is, that a demand must be made of the maker of the note, or at his residence or place of business, (if he has one or it is known) within the city, or place where the note is payable, in order to bind the endorser. *Story on Prom. Notes, sec.* 235.

This rule necessarily implies knowledge on the part of the holder, of the place of residence or business. Accordingly, where the circumstances are such as to render it difficult to acquire this knowledge, the rule is relaxed. CHAN. KENT *Com. vol.* 3, *sec.* 41, *p.* 95, says, "There is a great deal of perplexity and confusion in the cases on this subject, arising from refined distinctions and discordant opinions, and it becomes very difficult to decide what is precisely the law of the land as to the sufficiency of the demand upon the maker of the note or the acceptor of the bill."

If there be no particular and certain place identified and appointed, other than a city at large, and the party has no residence there, the bill may be protested in the city on the day, *without inquiry*, for that would be an idle attempt. The general principle is, that due diligence must be used to find out the party and make the demand, and the inquiry will always be whether under the circumstances of the case due diligence has been used. * * * * * * The presumption is, that the maker resides where the note is dated, and that he contemplates payment there. But it is presumption only, and if the maker resides elsewhere within the State, when the note falls due, and that be *known* to the holder, demand must be made at the makers place of residence. *Vide Note* 1, *Story on Prom. Notes*, 281.

"If the maker has no known residence or place where a

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presentment can be made, then the holder will in like manner be excused from any presentment." *Story on Prom. Notes, sec.* 237, *note* 4, and authorities there cited. These general principles were recognized and adopted by this Court in the case of *Nailor vs. Bowie*, 3*d Md. Rep.*, 256, *and Sasscer vs. Whitely & Stone*, 10 *Md. Rep.*, 102, 104.

The obligation to make a presentment and demand of payment of the maker of a note, extends to the case of a resident within the State, (if known to the holder) as well as to a resident of a city, but in the case in 10 *Md. Rep.*, 102, 104, the demand at the Post Office, of a note dated at Baltimore was deemed sufficient upon proof, that the Notary was unable to ascertain where the maker resided, although the defendant proved he had lived for forty years near Upper Marlborough, and had for the last thirty years extensive business transactions both with commission houses and banking institutions.

A personal demand and personal notice being dependent upon the knowledge of the holder, of the place of residence or business, of the maker and endorser, it is clear from these authorities, the Court correctly refused the 1st, 2nd and 8th prayers of the defendant, which required a demand of payment of the maker, at his residence or place of business, and personal notice of non-payment to the endorser, or notice at his place of business, without regard to the fact, whether the holder or Notary had knowledge of the residence or place of business of the makers or endorser respectively, or used due diligence to ascertain the same.

To the third prayer of the defendant, requiring the jury shall find that at the time the offer of compromise was made, the defendant knew of his rights of defence, and *expressly waived* and abandoned them, or such offer, etc. was no waiver, was too broad a proposition, as waiver is often more certainly indicated by acts than by words.

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The conduct of the defendant, which included all that transpired at his interview with the plaintiffs' counsel, was material and proper evidence to go to the jury, under the second issue in the case, the possession of the property for which the note was given was circumstantial evidence that the endorser was indemnified to some extent for his liability, and if he had been substituted for the makers, by his own act, he could not retain the thing sold, and refuse to pay the price. We do not perceive any evidence to warrant the fifth prayer of the defendant. It proceeds upon an hypothesis directly contrary to the evidence. It was proved the defendant resided in the City of Baltimore, and had a place of business there, where he received letters addressed to him through the Post Office, and that a letter addressed to him would, in the regular course of business be received by him the same day it was mailed, or the following morning.

The Notary testifies that on the same day of the protest, he addressed written notices to the drawers and endorser of the note, informing them it had not been paid, payment thereof having been demanded and refused, and they would be held responsible therefor, and dropped notices in the Baltimore Post Office, directed to the drawers and first endorser, after diligent search and inquiry, and failure to find them. Thus it appears the notice was directed to the defendant, and put in the Post Office of the city in which he resided and did business, and from which he usually received letters the same day or next morning.

The 6th prayer assumes a discrepancy between the description of the note sued on, and that mentioned in the protest, etc., no such variation appears in the testimony, and therefore its rejection was proper.

The 7th instruction amounts to a declaration, that there is no evidence of notice to the defendant of demand, nonpayment, etc., in the case.

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The protest itself was *prima facie* evidence of the presentment of the note for payment and its non-payment; and that notice of such presentment and non-payment were given the parties in the manner therein stated. Code, Art. 14, secs. 6 and 7. All of which was confirmed by the evidence of the Notary Public.

It appears from this summary of the several prayers of the defendant they were not supported by the law or the evidence, and therefore properly rejected.

The instructions given by the Court in lieu of those rejected are objected to, because they submitted to the jury to find among other facts "whether the Notary used reasonable diligence to ascertain the residences or places of business of the drawers of the note and endorser, and could not ascertain the same," which, it is contended, it was the province of the Court to determine.

In *Whitridge vs. Rider*, 22 *Md. Rep.*, 548, it was held by the Court as follows: "What constitutes due diligence upon any state of facts, agreed or to be found by the jury, is a question of law for the Court, and it is very difficult to lay down any general rule applicable to all cases. Each depends much on its special circumstances. This, however, can be stated generally, that if the holder does not know where the endorser or other party to be notified lives, but can inform himself by reasonable endeavor or diligent inquiry, he must do so." An endorser is entitled to strict notice, by which is meant, "that reasonable diligence shall be employed and reasonable efforts made to give it." 1 *Parsons on Bills & Notes*, 490, *note a*. 11 *Md. Rep.*, 486. 1 *H. & G.*, 248. 15 *Md. Rep.*, 285. The Notary must resort to all proper parties to the note within his reach; he must apply to the maker of the note if he is known and within reach.

The evidence in this cause shows the Notary inquired of the Cashier of the Mechanics' Bank, the holder of the

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note, and examined the City Directory to ascertain the residence and place of business of the drawer and endorser, (the defendant) and could obtain no information of either; that after diligent search and inquiry, and failing to find them, he presented the note and demanded payment at the Baltimore Post Office and Merchants' Exchange, and found no one to pay it; he then addressed written notices to the drawer and endorser informing them, etc., and dropped the notices in the Baltimore Post Office, directed to the drawer and first endorser, and mailed notices under covers for other endorser directed to N. F. Palmer, Esq., New York. It was further proved in the cause that the endorser did business under the name of "McAleer;" that he received letters through the Post Office addressed to himself in his own name, as well as in the name of "McAleer & Co.," and a letter addressed to him, or a notice, would, in the regular course of business, be received by him the same day it was mailed or the following morning, and that it was the usage or custom in Baltimore city if the makers and endorsers cannot be found, to make inquiry of the bank from which the note was received, and examine the City Directory, and if that does not disclose the place of business or residence of the parties, to make demand in some public place, usually the Post Office and Merchants' Exchange, and to address the notices for the endorsers to them and deposit them so addressed in the city Post Office. The Notary having complied not only with the general requisitions of mercantile practice, but the local custom of the city, as well as the demands of the law, in exercising reasonable diligence and care to ascertain the residences and places of business of the maker and endorsers, and make presentment and demand payment, and in default thereof to give notice to the endorser, the Court, if it had been asked, must have held and instructed the jury, if they be-

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lieved the evidence, that the plaintiff had used due diligence in those respects.

In this State, since *Jones vs. Wilmot*, 1 *H. & J.*, 477, it has been held to be the province of the Court to determine whether or not due diligence has been used by the holder of the note or bill to recover the money from the maker or acceptor, so as to fix the liability of the endorser; yet the same case decides that in the absence of such diligence the endorser may recover if it appears that the endorser subsequently promised to pay the amount of the note. This Court has repeatedly held that although there was error in the instruction of the Court below, such error will not be ground for reversal if it appears the party appealing was not injured thereby. 3 *Gill*, 459. 4 *Gill*, 406. 8 *Md. Rep.*, 208, 274. *Hanson vs. Campbell, lessee*, 20 *Md. Rep.*, 233. In the present case the instructions given by the Court submitted to the jury to find whether the plaintiff had used due diligence in making demand of the maker and giving notice to the endorser of non-payment and dishonor; and also whether the defendant, in the absence of knowledge of the omission to make such demand and give such notice, had promised to pay the debt. The jury finding for the plaintiff must have found the facts enumerated in the bill of exceptions to be true upon one hypothesis or the other; if they found upon the first hypothesis they arrived at the same conclusion of law which the Court would have reached, and should have directed the jury to be sufficient proof of due diligence if they believed the evidence on that point; if they found the promise subsequent, with knowledge, etc., they found such facts as rendered the question of diligence immaterial. So that in no aspect was the defendant injured by the instructions given.

The Court below in the instructions granted gave the defendant the benefit of all want of knowledge of non-pre-

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sentment and non-payment, if such existed, by requiring the jury to find his promise to pay the amount of the note, was made with a knowledge of the fact that no legal demand had been made on the drawer for payment before it should operate as a waiver of notice.

In the absence of reasonable diligence to find the residence or place of business of the maker and endorser, then the jury were required to find actual notice or a promise to pay, with knowledge of the fact that notice of non-payment had not been regularly given. Every precaution seems to have been taken to inform the jury of the facts necessary to be found to entitle the plaintiffs to recover, except the omission to define what was due diligence in law on the part of the Notary. This, we have seen, not prejudicing the defendant, is no cause for reversal.

Judgment affirmed.

(Decided March 13th, 1866.)

JAMES W. W. TAYLOR *vs.* WILLIAM H. HEBDEN.

APPOINTMENT AND REMOVAL OF OFFICERS: CONSTITUTIONAL LAW: JUSTICES OF THE PEACE.—By the Constitution of 1864, Art. 2, Sec. 16, it is provided that "All civil officers appointed by the Governor and Senate shall be nominated to the Senate within fifty days from the commencement of each *regular session* of the General Assembly; and their term of office, except in cases otherwise provided for in this Constitution, shall commence on the first Monday of May next ensuing their appointment, and continue for two years (unless sooner removed from office) and until their successors respectively qualify according to law." By Art. 12, Sec. 6, it is provided that "All officers, civil and military, now holding office, whether by election or appointment, under the State, shall continue to hold and exercise their offices according to their present tenure unless otherwise provided in this Constitution, *until they shall be superseded according to its provisions*, and until their successors be duly qualified." By Art. 6, Sec. 47, the term of office of Justice

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of the Peace was changed from an election by the people, to appointment by the Governor, by and with the advice and consent of the Senate. HELD: That Justices of the Peace who were elected in November, 1863, and in office when the Constitution of 1864 was adopted, continue to hold their offices until there shall be regular appointments by the Governor and Senate superseding them; and that the concurrent act of the Senate could only be had at a *regular* and not a *special* session of the Legislature.

APPEAL from the Superior Court of Baltimore City.

The facts of this case are stated in the opinion of the Court.

This cause was argued before BARTOL, GOLDSBOROUGH, and WEISEL, J.

A. Randall, Attorney General, for the appellant.

The appellant, Taylor, insists, that he was legally appointed to and held the office of Justice of the Peace, and that this decree ought, therefore, to be reversed, and the petition dismissed with costs, for the following reasons:

1st. Because Hebden being elected under the 19th section of the 4th Article of the late (1851) Constitution for two years from his election in November, 1863, his term of office would have expired on the second Wednesday of November, 1865, and the present Constitution, (which went into operation afterwards in November, 1864,) declaring by its 6th sec. of the 12th Article, that all officers then holding office shall continue to hold according to their present tenure, unless otherwise provided in this Constitution, &c., merely confirming this term of office to him till this second Wednesday of November last, and until his successor be duly qualified, his (Hebden's) office expired on that day by its own limitation.

2nd. That Hebden's term of office thus expiring on the second Wednesday of November, 1865, created a vacancy in the office of Justice of the Peace during the recess of the

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Senate, to which the Governor, who has the power to fill the same, did accordingly appoint Taylor, a suitable person, whose commission was to continue in force till the end of the next session of the General Assembly, &c., and whose nomination was made to the Senate within thirty days after the next meeting of the General Assembly, under the 14th section of the second Article of the present Constitution. See latter part of the 19th sec. of the 4th Art. of the late Constitution (1851,) and 47th and 48th sections of the 4th Art. of the present Constitution, and the Acts of 1862, ch. 68, and 1865, ch. 41.

3rd. The 16th section of the 2nd Article of the present Constitution does not apply to Hebden, nor prolong his term of office to the first Monday in May, as he contends, because he is not, in the language of this section, "an officer appointed by the Governor and Senate," but an officer elected by the people. This section applies exclusively to officers thereafter to be appointed, and not to such as, like Hebden, the Constitution finds in office, and to future appointments, to be nominated to the Senate within fifty days from the commencement of each regular session of the General Assembly.

4th. If there be not a vacancy in this office which the Governor had authority to fill under the 14th section of the 2nd Article of the present Constitution, then this appointment of a successor to Hebden is a case not otherwise provided for in the Constitution, and to which, under the 13th section of the 2nd Article of the Constitution, the Governor has the power to make a nomination, and by and with the advice and consent of the Senate appoint.

Wm. Price, for the appellee.

Wm. H. Hebden was elected twice a Justice of the Peace for the second ward of the city of Baltimore; once in November, 1861, and again in November, 1863. There is

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no question about his election, and it is only necessary to say, that he was in office when the new Constitution went into effect on the 1st day of November, 1864. The term for which he was elected, being for two years, from the second Wednesday of November, 1863, would expire on the second Wednesday of November, 1865.

The adoption of the new Constitution on the 1st of November, 1864, superseded the old on that day; and the appellee after that day held his office, and exercised its duties under the new Constitution; we must look to the new Constitution, to see what disposition is made of him and his office.

We turn then to the 6th section of the 12th Article of the new Constitution, where it is plainly declared, that "All officers, civil and military, now holding office, whether by election or appointment under the State, shall continue to hold and exercise their offices, according to their present tenure, unless otherwise provided in this Constitution, until they shall be superseded pursuant to its provisions, and until their successors be duly qualified." Under this section Hebden was entitled to hold and exercise his office, until the 2nd Wednesday of November, 1865; unless his case was otherwise provided for under the new Constitution, and until his successor was duly qualified.

We are now to ascertain how Justices of the Peace are appointed, and at what time they take possession of their offices under the new Constitution; for, until his successor is so appointed, Hebden holds his office.

The appointment of Justice of the Peace is provided for by the 47th section of the 4th Article of the new Constitution. Which declares, that they shall be appointed for the whole State by the Governor, by and with the advice and consent of the Senate. The terms and manner of the appointment are settled by the 16th section of Article 2, which provides, that "All civil officers appointed by the Governor

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and Senate, shall be nominated to the Senate within fifty days after the commencement of each regular session of the General Assembly, and their term of office shall commence on the first Monday of May following."

This review of the Constitution settles the right in favor of Hebden, unless his case is otherwise provided for, as declared by the 6th section of the 12th Article already referred to. Now to show that it is otherwise provided for, we are referred to the 14th section of Article 2, which provides, that in case of a vacancy, during the recess of the Senate, in any office which the Governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force until the end of the next session of the General Assembly, or until some other person is appointed to said office, which ever shall first occur; and the nomination of the person thus appointed during the recess, or of some other person in his place, shall be made to the Senate within thirty days after the next meeting of the General Assembly.

The whole question then resolves itself into this: was there a vacancy in the office of Hebden, when Taylor was appointed to his office?

It is impossible, as it appears to me, to look at the 14th section of Article 2, and say, that it can bear such a construction. The vacancy there spoken of, is one occurring in the recess of the Senate, by death, resignation, removal from office, change of residence, or the like. It provides for the accident of a vacancy. But there was no such accident in the case of Hebden.

He was in office under all the sanctions of the Constitution; was entitled to hold and exercise his office up to the day when his successor was appointed and qualified.

His case is strictly within the terms of the 16th section of Article 2. His successor could only be appointed at a regular session of the General Assembly, and, as such successor

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could only take possession of his office on the first Monday of May succeeding, it follows, that Hebden's successor can be appointed at the regular session of the General Assembly, commencing in January, 1867, and can then only enter upon the duties of his office on the first Monday of May, 1867. Hebden will therefore continue in office until that time.

WEISEL, J., delivered the opinion of this Court.

This cause has been heard in obedience to a resolution of the General Assembly, passed at its recent special session. Doubts having been seriously entertained as to the legality of the appointments of Justices of the Peace in November last, by the late Governor, his Excellency, Governor Swann was requested and authorized to have a cause instituted and tried, and brought on appeal to this Court for an early determination.

The record shows that the appellant in this case received the appointment of Justice of the Peace for the second ward of Baltimore City, from Governor Bradford, in December last; that he took the oath of office soon after, and entered upon the discharge of its duties and superseded the appellee in said office; that the appellee was elected to said office in November, 1863, by the voters of said ward, under the Constitution of 1851, and was in office when the present Constitution went into effect, and continued therein until that appointment, when, supposing that his term of office had expired, and that he was validly superseded in it, he retired from it and permitted the appellant to occupy it. Being afterwards advised that Taylor's appointment was not authorized by the Constitution, he applied to the Superior Court of Baltimore City for, and obtained the writ of *mandamus* to be restored to the office. The answer of the appellant admitted the election of the appellee as stated

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and his own appointment to said office, and his occupancy of it, and insisted upon its constitutional validity. A *pro forma* order was passed by his Honor, JUDGE MARTIN, granting the writ requiring the appellant, Taylor, to vacate the office, and restoring Hebden, the appellee, to it. From this order the present appeal was taken.

By the Constitution of 1851, Justices of the Peace were elected by the qualified voters of the State, and held their offices for two years from the time of their election, and until their successors in office were elected and qualified. Art. 4, sec. 19. The appellee in this case was elected a Justice of the Peace, in the second ward of Baltimore City, in November, 1863, and for the term above specified.

Whilst thus in office, the people of the State in Convention assembled, framed and adopted a new Constitution, which went into effect on the first day of November, 1864. By it the tenure of office of Justices of the Peace was changed from an election by the people, to appointment by the Governor, by and with the advice and consent of the Senate, the term of office to be two years. Art. 6, sec. 47. And by Art. 2, sec. 16, it is provided that "all civil officers appointed by the Governor and Senate, shall be nominated to the Senate within fifty days from the commencement of each *regular* session of the General Assembly ; and their term of office, except in cases otherwise provided for in this Constitution, shall commence on the first Monday of May next ensuing their appointment, and continue for two years (unless sooner removed from office,) and until their successors respectively qualify according to law."

These provisions regulate the original appointment of Justices of the Peace, (as distinguished from the filling of vacancies), and fix the time of the commencement and termination of their office. The *regular* sessions of the General Assembly are biennial ; the appointments of Justices

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of the Peace are to be made at *each regular session;* and their term of office shall commence on the first Monday of May next ensuing their appointment. No other time is fixed for this purpose in the Constitution. This mode allows a full session for the appointments to be made, and reasonable time for issuing their commissions and for their qualification for office. By it order and regularity are observed, and after the first appointments under the Constitution shall have been made, the machinery of government in this branch of the public service will move on without interruption. Such is the obvious design of the Constitution in this respect.

But at the time the Constitution of 1864 was adopted and went into effect, all the public offices of the State were filled. Justices of the Peace held office throughout the State by elections of the preceding year, when, they had been chosen for two years from that time, and until their successors in office were elected and qualified. What provision did the Constitution make as to them? It was competent for the Convention to terminate their office with the old Constitution which it superseded, or to have diminished or extended their existing term according to the public requirements or necessities. With regard to the Judges then in office, for example, the Constitution provided that they should continue to act as Judges of their respective Courts, *until the expiration of the term for which they were respectively elected,* and until their successors should be elected and qualified. (Art. 4, sec. 27.) But with regard to *Justices of the Peace then in office,* no such special provision was made, but a general section was inserted, which embraced them, and provided for the continuance and termination of their existing offices. This is sec. 6 of Art. 12, which is in these words: "All officers, civil and military, now holding office, whether by *election* or appointment under the State, shall continue to hold and exercise their

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offices, according to their *present tenure*, unless otherwise provided in this Constitution, *until they shall be superseded pursuant to its provisions*, and until their successors be duly qualified."

In virtue of this section Justices of the Peace then in office by election, continue to hold their offices according to their then tenure, *until superseded pursuant to the provisions of the Constitution*. In what mode are they to be superseded? Plainly by the concurrent action of the Governor and Senate, according to the 47th sec. of Art. 4, and the 16th sec. of Art. 2. Whether that could have been done at the first regular session of the Legislature which immediately succeeded the adoption of the Constitution, to wit, in January, 1865, it is needless now to inquire. No nominations for appointments of this class were made at that time, and of course the concurrent action required did not take place, nor has any since taken place in conformity with the requirement of the Constitution, as no *regular* session of the General Assembly has since been held, nor can any constitutionally be held before January, 1867. The Justices of the Peace, therefore, who were elected in November, 1863, and in office when the present Constitution was adopted, continue to hold their offices until there shall be regular appointments by the Governor and Senate, superseding them, which cannot be before the next regular meeting of the Legislature, in January, 1867, and to the first Monday of May thereafter.

Such would be our interpretation of the Constitution, in relation to these officers, if we had nothing but the language of that instrument to guide us. But we have an express adjudication by this Court upon the meaning and effect of the clause "until superseded pursuant to the Constitution," in the case of *Watkins vs. Watkins, in 2d Md. Rep.*, 355. In the Constitution of 1851, there was a similar provision with regard to all officers, civil and military,

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holding commissions under the State, when it went into operation. (Art. 10, sec. 8.) The Adjutant General of the State, under the Constitution which existed prior to that of 1851, held his office during good behavior. The Constitution of 1851 changed the term of office to six years, and gave the power of appointment to the Governor and Senate, as before. The Governor did nominate a successor to the Senate, but that body declined either to confirm or reject, on the ground that the incumbent held by his former tenure, and the Constitution made no provision for fixing the time of the appointment of his successor, and that this was not in the discretion of the Executive. After the adjournment of the Legislature the Governor appointed a successor, regarding the office as vacant, and that he had the power to fill it. The incumbent refused to surrender the papers, &c., of his office, upon which the appointee filed his petition for a *mandamus*, requiring him to make the delivery. In that case on appeal, LE GRAND, Chief Justice, pronouncing the opinion, decided that the incumbent under the old Constitution held under his commission until he was superseded by the concurrent action of the Governor and Senate, and inasmuch as that had not taken place the office was not vacant, and the new appointment was unauthorized and void. The following extract from the opinion in that case will apply to this, and sustain our construction of the clause we have referred to.

"The appellee," (said the Court, after reciting the sections of the Constitution relating to the appointment in that case,) "at the adoption of the Constitution, held a military commission under the State, and by force of the section last quoted, he was to continue to hold it until he should be superseded, *pursuant to the provisions of the Constitution*, and his successor should be duly qualified. The question then is, how could the appellee be superseded *pursuant to the provisions of the Constitution?* The question

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is answered by the second section of the 9th article, which provides, that the Adjutant General shall be appointed by the Governor, by and with the advice and consent of the Senate. It requires a concurrence of action on the part of the executive and Senate, and in our judgment, until this takes place the incumbent under the old Constitution holds under his commission. It is clear to our minds that it was the intention of the framer of the Constitution, to abolish the life tenure * * and in the case of the Adjutant General, to limit his term of service to the period of six years. But it is equally plain to our minds, that the person who held the office when the new Constitution went into operation continues to hold it until such time as he be superseded by the concurrent action of the Governor and Senate, or shall resign, or shall be removed by death, or in pursuance of a court martial, as is provided in the 15th section of the 2nd article of the Constitution. * * Our opinion is, that until the Governor and Senate concurred in the appointment of an Adjutant General, the appellee held under his commission, and as no such concurrence has been had, he still continues to do so."

The appellant in his answer to the petition for the writ, alleged that the office of the appellee had become *vacant*, and that he was appointed to it by the Executive rightfully. The same ground was taken and endeavored to be maintained by the learned Attorney General of the State, who supported his claim to the office, in his brief and in his argument before this Court, and section 48 of Article 4, and section 14 of Article 2, which regulate the filling of vacancies were relied upon. But we can only say, as this Court said in the case of *Watkins vs. Watkins*, that those sections only authorize the Governor to fill vacancies, and if no vacancy occurred in the office held by the appellee, those sections do not apply to it. No vacancy took place by death, resignation or removal of the incumbent, or any

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other cause which would constitutionally vacate the office, and until such occurred, the appellee continued in office under his former tenure and until superseded in the way mentioned, at a *regular* session of the Legislature, and by the concurrent act of the Governor and Senate.

The Governor alone has the power of filling a *vacancy* in the office of a *Justice of the Peace* under section 48, Article 4, as decided by this Court in the case of *Cantwell vs. Owens*, 14 *Md. Rep.*, 215, (the provisions in the two Constitutions of 1851 and 1864, being the same on this subject,) but that would be *for the residue of the term*. In this case the incumbent was still the occupant of a term, subsisting by virtue of the 6th section of Article 12.

A special or extraordinary session of the Legislature has recently been held, but the record does not show what took place at it in relation to this appointment. In the brief of the Attorney General it is stated that his nomination was made to the Senate within thirty days after the meeting of the body. But we think that even if the nomination of the appellee had been submitted to and confirmed by the Senate at this extra session, this action, though concurrent, would not have rendered the appointment valid, as an original appointment, inasmuch as that session was not a *regular* session of the General Assembly, and the incumbent could not be superseded in his office at that time. We have already said there was no *vacancy* in the office. In either aspect then, a nomination to and confirmation by the Senate, at the extra session, of the appellee would have been nugatory acts.

We are therefore of the opinion that the appointment of the appellant to the office of Justice of the Peace for the second ward of Baltimore City by the late Governor, at the time and under the circumstances mentioned in this record, was not authorized by the Constitution, and that the appellee, William H. Hebden, was, and is the rightful

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incumbent of said office, and that the order or decree of the learned Judge below, restoring him to it, should be affirmed.

Order affirmed with costs to the appellee, and cause remanded.

(Decided March 14th, 1866.)

NOTE.—The reporter is requested to say, that Judges BARTOL and COCHRAN who did not sit at the hearing of this case, have examined the questions involved, and entirely concur in the foregoing opinion of the Court.

GEO. MCDOWELL AND OTHERS *vs.* SAMUEL H. GOLDSMITH.

LIMITATIONS: JUDGMENT,—CONFESSION OF BY ADMINISTRATOR CANNOT DEPRIVE THE GRANTEE OF HIS INTESTATE OF THE DEFENCE OF LIMITATIONS.—In August, 1845, the creditors of O, grantor in a conveyance of real estate, filed a bill to set aside said deed as fraudulent. G, the defendant and grantee in said deed, pleaded the state of limitations, and the cause being heard on bill and exhibits, answer and testimony taken, a final decree was passed dismissing the bill as to certain of the complainants and other creditors who had come in by petition, which decree upon their appeal was affirmed and the cause remanded. The final decree having directed the sale of the real estate for the payment of other claims thereby allowed, upon its affirmance, the trustees therein named proceeded to advertise the property for sale, giving the usual notice to creditors, under which certain of said complainants and creditors having obtained judgments by confession against the administrator of O, again filed their claims. New claims were also filed under said notice, to all of which the defence of limitations was taken by G, by way of exceptions to the auditor's reports and accounts. HELD:

That the defendant having been held by the Chancellor and Court of Appeals entitled to the defence of limitations to the claims of the creditors assailing the deed, the administrator of O could not deprive him of that defence by any admissions or acts whatever.

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——: ——: PRACTICE IN EQUITY.—The final decree of the Chancellor "reserved for further directions," all questions in regard to the claim of one of the complainant, T, on a note made in 1844 for $2,800. It subsequently appeared that said note was for a debt contracted after the execution of the deed and did not mature until October, 1845, after letters were granted, (August 27th, 1845,) and two months after the said bill was filed, and was not filed as a claim in the cause until December, 1850. The administrator of O had also confessed a judgment in favor of this claimant. HELD:

That the claim of T was barred by the defence of limitations, relied on in the answer of G to the bill of complaint, it appearing that limitations began to run in 1845, a period of more than three years before the claim was presented or asserted by any proceeding in the cause.

That T had the right at the maturity of the note, if not before, to become a party to the said suit with respect to it; but to bring it within the equity of the bill already filed, it was necessary to present the note and assert it as a claim in the cause.

That the confession of the judgment by the administrator does not affect the nature of the claim.

LIMITATIONS: PRACTICE IN EQUITY: EXCEPTION PRESENTING SUBSTANTIALLY THE DEFENCE OF LIMITATIONS SUFFICIENT.—Where an exception to claims filed under a notice to creditors presents in substance the defence of limitations, it will be held sufficient: the substance of the objection or defence must govern in determining its sufficiency rather than the form in which the objection or defence is presented.

APPEAL from the Circuit Court for Baltimore City.

This appeal is taken from an order of the Circuit Court for Baltimore City, passed 31st May, 1861, whereby the auditor's accounts A and B are finally ratified, and the exceptions to his account C are sustained, and that account is rejected. The original bill was filed by McDowell and others claiming to be creditors of one Elizabeth Osborne, deceased, for the purpose of avoiding certain conveyances made by her to Goldsmith in fraud, as it was alleged, of her creditors. In the progress of the cause, others claiming likewise to be creditors intervened, and on the hearing of the cause the late Court of Chancery, on the 21st October, 1851, passed a decree, whereby one of said conveyances was vacated and declared null and void as against the com-

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plainant, Sarah Ann Truitt, claiming as the holder of the promissory note of the deceased for $1,100, and dated 6th November, 1843, "and such other creditors of the deceased as shall hereafter come in under this decree and establish their claims to the satisfaction of this Court," and for the payment of said claims the property assigned by said deed is decreed to be sold, &c. The decree further provides that all questions in regard to the claim of the said Sarah Ann Truitt, on the promissory note of the deceased, for the sum of $2,800, and dated the 21st October, 1844, be "reserved for further directions," and that the bill of complaint be absolutely dismissed as against George McDowell and John Gable, Charles Z. Lucas and Wiley Lankford, complainants named in the original bill of complaint; and as against Walter Crook, Junior, David Arden, Ann Maria Vickery, Benjamin Harrison, William H. Harrison, John Easter of John, Hamilton Easter and William J. Hyde, Hamilton Easter, John B. Charron, William Pierson, Ira B. Canfield and William H. Canfield, petitioners named in said petition and thereby claiming to be creditors of the deceased.

All parties appealed from this decree; but on hearing, the same was affirmed at December Term, 1854, and the cause was remanded to the Circuit Court for further proceedings. *See* 2 *Md. Ch. Dec.*, 370, *and* 6 *Md. Rep.*, 319.

The trustees immediately after this affirmance proceeded to advertise the property for sale, and at the same time, in accordance with the terms of the decree, gave notice to the creditors of Osborne to file their claims properly authenticated in the office of the clerk of the Circuit Court for Baltimore city, within two months from the day of sale.

Goldsmith then filed a petition stating that he was ready, and had offered to pay the allowed claim of Truitt, and that he believes no other claim can be established under the de-

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cree, unless it be the suspended claim of said Truitt, which he is prepared to litigate, and will pay if it shall be established, and praying that the sale may be suspended. The trustees answered this petition, asserting it to be their duty to sell under the decree, denying that no other claims but Truitt's can be established, and on the contrary averring that claims to the amount of several thousand dollars can and will, as they believe, be established under the decree; that they have already notice of several such claims admitted to be just and true by the administrator of said Osborne, and have reason to believe there are many more which will in due time be proven and established. The Court passed an order directing the defendant to bring in the amount of Truitt's allowed claim, and ordering the trustees to desist from making the sale, but directing the advertisement and notice to creditors to be continued to the day of sale, to the end that creditors may have notice to bring in their claims as provided by the decree. The trustees entered an appeal from this order, which was not prosecuted, because by agreement a sale of the property for $10,000 was subsequently effected to Stewart, the trustee of the defendant's wife, upon certain terms and conditions which need not be particularly stated. This sale was reported and finally ratified on the 10th of October, 1857.

Claims properly authenticated of many creditors were then filed under this decree and notice, and prior to the statement of the accounts by the auditor, which may be classified thus:

I. Claims of creditors who were not parties to the original or amended bills, and who then filed their claims for the first time.

II. Claims of creditors, who, though parties to the original or amended bills, never filed any claims or offered any

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proof of their being creditors prior to the decree, and then filed their claims for the first time.

III. Claims of creditors who were parties to the original or amended bills, and filed claims before the decree, upon which they have since recovered judgments against the administrator of the deceased debtor, and then presented their claims in the shape of judgments.

IV. *The suspended claim of Sarah Ann Truitt:* On this claim, also, there was a judgment by confession in the Superior Court of Baltimore City, March 1st, 1855, for $4,368, with interest from the 1st of March, 1855, and costs. This judgment was filed on the 23d of June, 1858. In other respects this claim stands upon the proofs taken before the decree.

On the 5th of November, 1858, an order was passed by agreement referring the papers in the cause to the auditor, to state the accounts between the parties from the proceedings and proofs in the cause, with power to take such other proofs as may be adduced before him. Most of the above claims, with the proof supporting them, had been filed previous to the passage of this order. The only claims and proofs subsequently filed are the affidavit and judgment in support of the claim of Vickery, the judgment in favor of Needles, and the claim of Golder. Such was the position of the case when the special auditor stated the accounts and made his report on the 25th of May, 1859.

Account A merely ascertains the amount for distribution, deducting from the proceeds of sale the commissions, costs and expenses; account B applies this balance to the payment of Truitt's allowed claim on the $1,100 note, and the entire residue is allotted to the defendant, Goldsmith. Account C stated under instructions, distributes the balance ascertained by account A, in part payment of the claims of the several creditors above referred to. In his report the auditor recommends the ratification of accounts A and B,

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and the rejection of account C. He rejects Truitt's suspended claim on the $2,800 note, because, he says, since the decree *evidence has been furnished* that letters of administration on Osborne's estate were granted before this note matured, and, therefore, limitations bars the claim. The auditor further says, that so far as the original complainants are concerned, the judgments only present in another form the claims already adjudicated, when the judgments were obtained; and that the dismissal of the bill absolutely as to these creditors is a sufficient reason for rejecting their claims; and further, that all the judgment claims, whether of creditors named in the decree or of those who have come in since the notice, are barred by limitations, if that defence can prevail against a judgment confessed by the administrator of Osborne.

The creditors, to whom the fund was distributed by account C, filed exceptions to the auditor's report and account B, because not in conformity to account C, which, they say, is the proper statement of the account, and on the 6th of February, 1861, an order was passed setting the cause down for hearing on the 18th of that month. On the 20th of March, 1861, the defendant filed exceptions to account C for the several reasons stated in the auditor's report, and more especially to the claim of Truitt on the $2,800 note, "for that *the same is now shown to be barred by limitations;*" and to the claims of McDowell & Gable and others, named, and to each of them, "for that the same have been already adjudicated upon and disallowed, and the claimants dismissed from the cause by the decrees of the Court of Chancery and the Court of Appeals; and, moreover, if proper to be litigated, are, and each of them is not proved, and if proved are and each of them *is barred by limitations;*" and to the claims of Needles and others, and to each of them, "for that they are not, nor is either of them, proved, and if proved are and each of them *is barred by limitations.*" And on the

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21st of March, 1861, he also filed an exception to the proofs offered in support of Truitt's claim on the $2,800 note, "because the same is not relevant to the averments in the original or supplemental bill, and because the same does not tend to establish any debt due by said Osborne at the date of the last of the series of conveyances from her to the defendant, or at the time of filing the original bill in this cause."

The Court, KREBS, J., adopted the views of the auditor, and on the 31st of May, 1861, passed an order overruling the exceptions to account B, and sustaining these to account C, and finally ratifying accounts A and B. From this order, the creditors whose claims were filed and thus rejected, appealed.

The cause was argued before BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

S. Teackle Wallis and *O. Miller* for the appellants.

As to Truitt's claim on the $2,800 note. In reference to this it will be contended:

1st. That being the payee and holder of this note at the time the original bill was filed, she was a *creditor* by reason thereof, and competent to file a bill thereon to vacate the deed of February, 1844, *for fraud*, even though the note had not then matured, and consequently the filing of such bills by her prevented the running of the statute of limitations against this claim. A subsequent creditor may file a bill to vacate a deed for actual fraud in fact, and Truitt became a creditor for this purpose, and Osborne a debtor from the date of the execution of the note. It is clear that if a conveyance be not made *bona fide*, but colorably, with actual intent to defraud any existing creditor or creditors, it may be avoided by subsequent creditors; in other words, evidence of collusion as against existing creditors is sufficient evidence of fraud against subsequent creditors.

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Brinton vs. Hook, 3 *Md. Ch. Dec.*, 477. *Sexton vs. Wheaton*, 8 *Wheat.*, 229. 1 *Story's Eq.*, *sec.* 356. 1 *Amer. Lead. Cases*, 40, (*Ed. of* 1857,) *and cases cited in notes* 1, 3, *especially* 3 *Wend.*, 411, *and* 19 *Pick.*, 231. 1 *Amer. Lead. Cases*, 42, (*Ed. of* 1857.) *Waters vs. Dashiell*, 1 *Md. Rep.*, 470. *Williams vs. Banks*, 11 *Md. Rep.*, 198. *Brown et al. vs. Bank of Miss.*, 31 *Miss. Rep.*, 454.

2nd. But assuming that a subsequent creditor had no right to file a bill, and can only come in after the deed is vacated at the suit of antecedent creditors, still, limitations it is submitted does not bar this claim. It was filed December 30th, 1850. Osborne, the debtor, left the State, and died out of the State before the maturity of the note, and before the bill was filed. She could not therefore have been sued in Maryland on this claim, and there is no proof in the record that letters of administration were ever taken out upon her estate here prior to December 30th, 1850. Under such circumstances limitations never commenced to run against this claim before it was filed. *Act of* 1715, *ch.* 23, *sec.* 4. *Act of* 1765, *ch.* 12, *secs.* 2, 3. *Code*, *Art.* 57, *sec.* 4. *Fishwick vs. Sewell*, 4 *H. & J.*, 393. *Haslett vs. Glenn*, 7 *H. & J.*, 17. *Hysinger vs. Baltzells*, 3 *G. & J.*, 158.

3rd. Again, if no bill could have been filed on this claim, and it could only have been presented after the decree had vacated the deed, at the suit of antecedent creditors, then it is clear that the plea of limitations set up in the *answer* had no reference or applicability to this claim. This being so, limitations has never been pleaded to it by any one. The mere assertion in the exceptions to account C, that the claim "is *now shown* to be barred by limitations," is not a plea of the statute, such as is required even by the loosest rules of chancery pleading. Limitations must always be pleaded, both at law and in *equity*, and a defendant cannot avail himself of this defence, because the pro-

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ceedings of the plaintiff *show a case* to which limitations might be applied. *Chambers vs. Chalmers*, 4 *G. & J.*, 420. *Strike's case*, 1 *Bland*, 57. *Hepburn's case*, 3 *Bland*, 95. *Dorsey vs. Dorsey*, 6 *G. & J.*, 12. *Lansdale vs. Ghequire*, 4 *H. & J.*, 259.

II. As to the claims of creditors not parties to the original or amended bills, and who filed their claims under the decree and notice to creditors.

It will be insisted on behalf of these claimants, and all others who have recovered similar *judgments* against the administrator, that the plea of limitations filed by the fraudulent grantee in this case is no bar to such claims, for—

1st. The fraudulent deed passed no title as against the defrauded creditors. The title and property still remained in the grantor for the benefit of her creditors. Such deeds are void *ab initio*, not to be recognized for any lawful purpose, not even as security for advances and improvements made on the property by the grantee. As the title still remains in the grantor for the benefit of his creditors, notwithstanding the deed, he can convey it by another deed, or make any other disposition of it for their benefit he may see fit. *Waters vs. Dashiell*, 1 *Md. Rep.*, 470. *Strike vs. McDonald*, 2 *H. & G.*, 261. *Bridges and Woods vs. Hindes*, 16 *Md. Rep.*, 101.

The title to this property, this equity of redemption, remained in Osborne during her life, and upon her death so much of it as was real estate devolved upon her heirs, and so much of it as was personalty upon her personal representative. A large portion of the property was personal estate, and vested in her administrator whenever letters were granted, by relation, from the time of her death. *Winchester vs. Union Bank*, 2 *G. & J.*, 79.

Now to claims against the personal estate of an intestate, the administrator alone can plead limitations; it cannot be

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done by legatees or devisees. The administration of the estate in this respect is referred entirely to his honesty and discretion, which is absolute and uncontrolable in the matter. *Spencer vs. Spencer*, 4 *Md. Ch. Dec.*, 465. *Owens vs. Collinson*, 6 *G. & J.*, 4.

An acknowledgment by an administrator is sufficient to remove the bar of the statute as to a claim on a simple contract debt against his intestate. *Forbes vs. Perine's Adm'r.*, 1 *H. & J.*, 109. *Chapman vs. Dixon*, 4 *H. & J.*, 527. *Kent's Adm'r vs. Wilkinson*, 5 *G. & J.*, 497.

The statute does not extinguish the debt, but only bars the remedy. *Vesey vs. Bassett*, 7 *H. & J.*, 461. And the administrator in whom alone rests the discretion to plead the statute or not, having waived the plea, and confessed judgments on these claims, such judgments bind all assets which may or ought to have come into his hands. So far, therefore, as the fund in question is the proceeds of personal property, it is confidently submitted, that it is liable for the payment of all judgments so confessed and filed in the case.

2nd. The decision of this Court on the former appeal does not go to the extent claimed, and has not the effect sought to be given to it by the appellee. The great question argued on the former appeal was, whether, under *any* circumstances or for *any* purpose, a fraudulent grantee could avail himself of this defence as against defrauded creditors? The Court decided that he could do so in reference to the claims as then presented.

III. As to the claims of creditors who, though parties to the original or amended bills, never filed any claims or offered any proof of their being creditors prior to the decree, but came in and filed their claims under the decree and notice.

As to these it is insisted:

1st. That the fact that the decree dismissed the bills as

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to these parties can have no effect upon their claims thus presented. The bill simply alleges that Osborne was indebted to these parties. It does not set forth how she was so indebted, whether upon bill, bond, note or open account, nor were any claims or accounts showing such indebtedness filed with the bills, or any proof of any claim whatever, or of their being creditors in any shape, offered prior to the decree. The dismissal of the bill as to them was simply equivalent to a judgment of *non pros.* at law.

A decree dismissing a bill is a bar even to a new bill only where the Court has determined that the plaintiff had no title to the relief sought by his bill, and, therefore, an order dismissing a bill for want of prosecution is not a bar to another bill.

It is not an absolute dismission so as to bar a new suit, unless it be an absolute decision on the *same point* or *matter;* where the point or matter decided is not the same, or where *new rights* are acquired *after the decree,* a party may file a new bill even though his former bill has been dismissed *on the merits.* So *a fortiori* could these parties file claims such as these under this decree. *Story's Eq. Pl., sec.* 793. *Sawyer vs. Bletsoe,* 2 *Vernon,* 328. *Same case,* 1 *Vernon,* 244. *Neafie vs. Neafie, et al.* 7 *Johns. Ch. Rep.,* 1. *Perine vs. Dunn,* 4 *Johns. Ch. Rep.,* 142. *Mitford's Ch. Pl.,* 279, 280. *Pickford vs. Hunter,* 5 *Simons,* 122. *Bridges vs. Sumner,* 1 *Pick.,* 371. *Estil vs. Taul,* 2 *Yerger,* 470. *Dixon vs. Sinclear,* 4 *Vt. Rep.,* 361. *New Eng. Bank vs. Lewis,* 8 *Pick.,* 117. *Barr vs. Jackson,* 20 *Eng. Ch. Rep.,* 585, (1 *Y. & Col.*) *Scudemore vs. White,* 1 *Vern.* 456.

The judgments claim therefore of McDowell and Gable, Hamilton Easter and Company, and Canfield and Brother, stand on the same footing with regard to the plea of limitations as the other judgment claims.

3rd. The claim of Lankford is different. It is a judgment against Osborne *in her life time,* recovered on the 17th of

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February, 1845, in the State of New York, in the Court of Common Pleas for the city and county of New York, and was filed in this case on the 22nd of March, 1845. Now to this claim limitations of three years is not applicable, and twelve years had not elapsed when the claim was filed. A judgment rendered in another State is not subject to plea of limitations except twelve years. *Bank of U. S. vs. Merchants' Bank*, 7 *Gill*, 426. *Mills vs. Duryee*, 7 *Cranch*, 481. *Hampton vs. McConnell*, 3 *Wheat.*, 234. *Andrews vs. Montgomery*, 19 *Johns.*, 162. *Hughes vs. Davis*, 8 *Md. Rep.*, 271. *Act of* 1715, *ch.* 23. *Code*, *Art.* 57, *secs.* 1, 3. *Duvall vs. Fearson*, 18 *Md. Rep.*, 502.

IV. As to the claims of creditors who were parties to the original or amended bills, and filed claims before the decree, upon which they have since recovered judgments against the administrator, which judgments they have filed under the decree and notice to creditors.

It is submitted that the authorities already cited, as to the effect of a decree dismissing a bill, and of judgments against the administrator, apply also to these claims, and exempt them from the operation of the plea set up by the defendant.

The counsel for the appellants then further argued as an independent proposition, to affect as far as may be, all the defences of limitations taken, that it is not competent for the appellee, a fraudulent grantee, to plead limitations, after decree, to claims filed under the decree, notwithstanding that he may so plead in advance of, and to prevent a decree. The deed being avoided, for fraud found, the grantee has no standing in Court for any such purpose, the fund being then, like any other trust fund appropriated to creditors, with which the fraudulent grantee has no connection, so far as they are concerned, except as a trustee *ex maleficio*, and without any equities of his own. *Bridges vs. Hindes*, 16 *Md. Rep.*, 101. *Waters vs. Dashiell*, 1 *Md.*

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Rep., 470. *Strike vs. McDonald*, 2 *H. & G.*, 261. *Englehart vs. Blanjot*, 2 *Wharton*, 245.

Thomas S. Alexander and *George H. Williams* for the appellee.

I. The claim of Sarah Ann Truitt on the note for $2,800, dated 21st of October, 1844, at twelve months, was expressly reserved by the original decree for further directions, and so far as adjudication goes, stands unaffected by the decree. But the Chancellor in his opinion says: "The evidence shows that Elizabeth Osborne removed to New York in November, 1844, before that note matured, and there are no facts in the cause from which it can be fairly inferred that she could ever have been sued in Maryland on that note. Indeed, if it be true that she died in April, 1845, and there has been no administration on her estate, limitations could never have commenced to run against the claim." It is now shown—and the auditor so reports—that letters of administration on the estate of Elizabeth Osborne were granted to T. Parkin Scott before the note in question had matured, that is, before the 24th of October, 1845. The claim was filed as of the 1st of April, 1851; it is therefore clear that the claim is barred by limitations, to the benefit of which opinion the appellee has been declared to be entitled. But again, it will be found by reference to the testimony of William H. Collins, that Elizabeth Osborne was in the city of Baltimore in the month of March, 1845, so that limitations had commenced in her favor in her life time.

II. The claim of John Needles, next in order in account, rests: 1st. On an open account, which is not proved, and if proved would clearly be barred by limitations. 2nd. On a judgment confessed by Mr. Scott, as administrator, to bind assets. The auditor has very correctly said that a judgment, as against an administrator, is not evidence

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against the heir, either to establish the original indebtedness or to remove the bar of limitations. *Duvall vs. Green*, 4 *H. & J.*, 270. *Byerly vs. Stayley*, 5 *G. & J.*, 452. *Collins vs. Owens*, 6 *G. & J.*, 4. And *a fortiori* such judgment cannot be evidence against the grantee of the supposed debtor. It will be observed that the judgment relied on was confessed *pendente lite* and nearly ten years after the commencement of this suit, (vide Act 1835, ch. 38, sec. 2.)

But again, the fact of the supposed recovery is not proved, a short copy being insufficient for that purpose.

Those obligations would be equally applicable against the claim of Archibald Golder, but that claim appears to have been excluded by the auditor.

III. T. B. Sexton & Co., R. McEldowney & Co., and S. Cariss, come in under the decree, and, as evidence of their claims, rest on short copies of judgments confessed by Mr. Scott, as administrator. Those claims are therefore liable to the objections already taken to the claim of John Needles.

IV. McDowell & Gable were parties complainants to the original bill, and against them the bill was dismissed absolutely, as well by the decree of the Chancellor as by the decree of affirmance.

There is, therefore, *res adjudicata* as against them, and they cannot reopen the obligation by coming in under the decree. *Lent vs. O'Hara*, 7 *G. & J.*, 212. *Dorsey vs. Hammond*, 1 *Bl.*, 463. *U. S. Ins. Co. vs. Ellicott*, 7 *Gill*, 307. *Albert & Wife vs. Winn & Ross*, 5 *Md. Rep.*, 66. *Clabaugh vs. Byerly*, 7 *Gill*, 354. Act of 1835, ch. 380, sec. 2. *Jones vs. Nixon*, 1 *Younge & Collier*, 359, cited in 2 *Dl. Ch. Pr.*, *m. p.* 176. *Piggott vs. Horton*, 14 *Ves.*, 232. *Ellicott vs. Nicholls*, 7 *Gill*, 85.

2. There is no proof of the claim other than the short copy of a judgment confessed in favor of the claimants by

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Mr. Scott, as administrator, as before stated. This short copy is not evidence of the recovery, and the judgment, if proved, would not establish the claim as against the appellee. *Hammond vs. Hammond*, 2 *Bland.*, 362. *Boyd & Hance vs. Harris*, 1 *Md. Ch. Dec.*, 469. *Brooks vs. Dent*, 4 *Md. Ch. Dec.*, 473. *Stewart vs. Warfield*, 7 *G. & J.*, 190. *Dorsey vs. Smithson*, 6 *H. & J.*, 61. *Putnam vs. Bates*, 3 *Eng. Cond. Ch. Rep.*, 355. *Shewen vs. Vanderhorst*, 4 *Id.*, 460.

3. The claimants are supposed to reappear under the decree: the limitations would run up to the filing of the short copy.

V. The objections stated to the claim of McDowell & Gable are equally applicable to the claims of Walter Crook, Jr., Canfield Bros., B. & W. H. Harrison, H. Easter & Co., W. J. Hyde et al., and Anna Maria Vickery.

VI. The claim of Wiley Langford is liable to the objection that he was a party to the original bill, and that the bill was absolutely dismissed as against him. The evidence of his claim now relied on is a transcript of a recovery had against Elizabeth Osborne in her life time, in the State of New York, as far back as 17th of February, 1845. This judgment cannot be read as evidence against the appellee, who claims under a prior conveyance, and if admissible against him at this time, it was equally available against him at the date of the original decree.

COCHRAN, J., delivered the opinion of this Court.

These appellants, with the exception of Needles, Cariss, S. B. Sexton & Co., and R. Mc. Eldowney, were all parties to the original and amended bill, and as to them, with the exception of Truitt, the bill was absolutely dismissed by the final decree. The appellee insisted that this dis-

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missal bars their right to participate in this distribution, and in reviewing their exceptions to the accounts, finally ratified by the Court below, it will be necessary to ascertain how far the decree dismissing the bill affected their standing as creditors, entitled to payment out of this fund.

It will be seen by referring to the record that these exceptants filed the original and amended bill for relief as creditors of Osborne; that in the course of the proceedings a large mass of testimony was taken for the purpose of sustaining the allegations of the bill and establishing their claims as creditors; that the case was heard upon the bill, exhibits, answer and testimony, and a final decree passed by the Chancellor dismissing the bill, as to them, absolutely, which decree, on their appeal, was affirmed by the Court of Appeals. This brief review of the original proceedings is sufficient to show that the case was submitted to the Chancellor on its merits, and that the rights and claims of these appellants were finally adjudicated by his decree. The opinion filed by him, in conformity with which the decree was drawn, shows, beyond question, that these claims were considered and held to be barred by the appellee's defence on the statute of limitations. Nor is the decree itself less conclusive on this point, for it vacates the deed of 1844 from Osborne to the appellee, not for the benefit of all the parties then before the Court, and dealt with by the decree, but only in favor of Truitt and such other of the creditors of Osborne as should thereafter come in under the decree and establish their claims. These exceptants, therefore, cannot be heard to say that the bill was dismissed as to them for want of prosecution; they were before the Court, and heard upon proof offered to sustain the allegations of their bill, and they took and prosecuted an appeal from the decree passed thereupon. If the Chancellor intended to leave their rights and claims unaffected by his decree, he should have dismissed the bill

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without prejudice; and if the case was such as to authorize such a dismissal it was error to dismiss the bill absolutely. *Griffith vs. Fred. Co. Bank*, 6 *G. & J.*, 424. STORY, in his *Equity Pleadings, section* 793, says, that "a decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismission was upon the hearing, and was not in terms directed to be without prejudice." The condition of these claims is not changed for any of the purposes of this case by the administrator's confessions of judgments. He had no power to waive the appellee's defence of limitations, nor could he by any such waiver establish the claims of these exceptants against this fund. This is not a case of assets that may be administered by an administrator, but of a fund in chancery, to be disposed of under a decree that the administrator must respect, and to which, so far as these exceptants are concerned, the appellee is entitled. He, as grantee in the deed from Osborne, was held by the Chancellor and the Court of Appeals entitled to the defence of limitations to the claims of the creditors assailing the deed, and it is not to be supposed that the administrator could deprive him of that defence by any admission or act whatever. *Duvall vs. Green*, 4 *H. & J.*, 270. *Byerly vs. Staley*, 5 *G. & J.*, 432. *Collinson vs. Owens*, 6 *G. & J.*, 4. *Warfield vs. Welch*, 3 *G. & J.*, 259.

The claim of Truitt on the note for $2,800 stands on a different, though not more substantial footing. The deed vacated by the decree was executed in February, 1844; the original bill, in which the complainants allege the grantor's indebtedness to them when she executed the deed, as their cause of action and ground of their rights to relief, was filed in Agust, 1845, and this note, made in October, 1844, did not mature until October, 1845. It thus appears that the note was given for a debt, not within the description of the bill, but for one contracted after the deed was

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executed, and upon which the right of action did not accrue for some two months after the bill was filed. The claims were, therefore, not within the class of credits alleged, and Truitt, as a complainant, for that reason, had no standing upon it at the time the bill was filed. She undoubtedly had, in such a case as this, the right, at the maturity of the note, if not before, to make herself a party with respect to it; but to bring it within the equity of the bill, already filed, it was necessary to present the note and assert it as a claim in the cause. That, however, appears not to have been done until December, 1850, when the note was first filed with the Commissioner, and subsequently returned by him, with the testimony taken. The defence of limitations was made and relied on in the answer to the original and amended bill, and this claim, in our opinion, was barred by that defence, as it now clearly appears that limitations began to run in 1845, a period of more than three years before the claim was presented or asserted by any proceeding in the case. The claim was reserved by the decree for further "directions," and we find, by referring to the opinion of the Chancellor, a statement of the reasons why it was suspended for further consideration; he says "The evidence shows that Osborne removed to New York in November, 1844, before this note matured, and there are no facts in the cause from which it can be fairly inferred that she could ever have been sued in Maryland upon it. Indeed, if it be true that she died in April, 1845, and there had been no administration on her estate, limitations could never have commenced to run against this claim." He had before decided upon the authority of *Hall vs. Creswell*, 12 *G. & J.*, 36, that, while other parties might come into the cause as co-complainants with those named in the original bill, yet limitations would run against their claims until they did so come in and file them. Truitt was a complainant

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in the original bill, but not so in regard to this claim; she had no standing upon it at the time that bill was filed, and, as we have said, it was necessary to assert it by some affirmative proceeding in the case to bring it within the equities of the bill. This appears to have been the Chancellor's view of her standing in regard to it, and in that view we concur. The questions whether limitations began to run, so as to constitute a defence to the claim when it was first asserted in the case, must, therefore, be determined by the proof now appearing in the record. It is now presented in the form of a judgment, confessed by T. P. Scott, as administrator of Osborne, and we find, by a duly authenticated certificate of the Register of Wills for Baltimore city, filed after the hearing before the Chancellor, that letters of administration on Osborne's estate were granted to him on the 27th of August, 1845. It thus appears from the present state of the proof that limitations began to run from the day the note matured, and that the claims upon it were barred at the time of filing the note with the Commissioner. The confession of the judgment by the administrator does not affect the nature of the claim, and for reasons already stated does not remove the bar of the statute. The same may be said of the remaining claims of Needles, Cariss, S. B. Sexton & Co., and R. McEldowney & Co. These were filed in the case under the notice required by the decree, and all of them rest on judgments confessed by the administrator more than ten years after the death of Osborne, the debtor. The appellee excepted to them on the ground that they were not proved, and if proved, that they are barred by limitations. As against the appellee, these judgments are not to be taken as evidence establishing these claims; like those obtained or confessed in favor of the appellants, they are wholly inadmissible for that purpose. Without, however, noticing the questions whether

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they are otherwise proved, it will be sufficient for present purposes to determine whether the appellee's exception to them on the ground of limitations is sufficient to entitle him to the benefit of that defence. It was settled in *Banks vs. Williams*, 11 *Md. Rep.*, 198, that limitations is a defence that may be taken by way of exception in such cases as this. The only question here is in regard to the sufficiency of the exception. In substance it presents limitations as an objection to these claims, and we think it must be regarded as stating a defence upon which the appellee relies. The substance of the objection or defence must govern in determining its sufficiency rather than the form in which the objection or defence is presented. In our opinion the exception to these claims on the ground of limitations was sufficient, and we shall, for the reasons herein stated, affirm the order of the Court below, finally ratifying accounts of A and B, and sustaining the exceptions taken to account C, with costs to the appellee, and remand the cause.

Order affirmed.

(Decided March 14th, 1866.)

JAMES M. LESTER *vs.* G. W. HOWARD AND OTHERS.

APPEALS: MOTION TO DISMISS: PRACTICE IN COURT OF APPEALS.—Where an agreement to abandon an appeal for a legal and valuable consideration, executed on the part of the appellees, is fully proved to the satisfaction of the appellate Court and not denied by the appellant under oath or attempted to be disproved, there is no alternative but to dismiss the appeal.

The appellate Court alone has power to decide when an appeal will lie in any particular case.

APPEAL from the Superior Court of Baltimore City.

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Motion to dismiss an appeal.—The facts material to the decision upon this motion are stated in the opinion of this Court.

The motion was argued before BOWIE, C. J., GOLDSBOROUGH, COCHRAN and WEISEL, J.

The arguments on both sides upon the appeal are omitted, the ruling of the Court upon the motion rendering them immaterial.

Henry D. Loney and R. Stockett Matthews for, and *Benj. C. Barroll* against the motion.

BOWIE, C. J., delivered the opinion of this Court.

An appeal was entered in this case by the defendant in proper person, on the 22nd September, 1863, and bond executed and approved.

The appellee moves to dismiss the appeal, and files an affidavit, in which he alleges, "That judgment was obtained therein in favor of the plaintiffs, as well as in another suit in which he was also a plaintiff with different parties, in the Court of Common Pleas of Baltimore City, at May term, 1863. That subsequently the said Lester appealed to the plaintiffs to release the lien of said judgments on certain property belonging to him, which he was endeavoring to sell, and in consideration of the granting of said release by the plaintiff, of the lien of the judgment, the said Lester agreed to pay the full amount of the judgment in the Court of Common Pleas, with costs, and to dismiss the appeal therein, and to pay the amount of interest accrued on the judgment in the Superior Court, and to abandon the appeal thereupon and to pay, within thirty or sixty days, at the farthest, the full amount of said judgment; that this agreement was made on the 4th of January, 1864; that *the liens aforesaid were released*, and *the orders of plaintiffs and their*

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attorneys, Messrs. Matthews & Loney, were filed to that effect; that the said Lester thereupon did pay the full amount of the judgment and costs in the Court of Common Pleas, and did also pay the interest accrued to that date upon the judgment in the Superior Court, but failed to pay the full amount of said judgment within the stipulated time, although repeatedly afterwards promising so to do, and has failed to abandon the appeal in this case in accordance with the stipulation for which he received a valuable consideration," etc.

In addition to the affidavit of the appellee, the affidavit of R. Stockett Matthews, an attorney of this Court, is filed, in which he deposes that he was counsel for the appellee in the above case of *Howard and others vs. Lester;* that he was present and privy to the arrangements made by George W. Howard, one of the appellees, with the defendant (the appellant) as set forth in the affidavit of said Howard, and that the matters and things set forth in said affidavit are true; and further says that repeatedly, after the release of the lien as described in the said affidavit, the said Lester promised to fulfill his full undertakings and agreement, and stated that the appeal in this case was taken for delay solely.

Short copies of the docket entries in the case of *George W. Howard et al. vs. James M. Lester*, in the Superior Court of Baltimore City, were also filed, "Showing that on the 4th January, 1864, property on Hamburg street, and also on Franklin street near Pine street, was released from plaintiff's claim by notice of the judgment in this case by order of plaintiffs and plaintiffs' attorneys filed;" also short copies of the docket entries, in the Court of Common Pleas, May term, 1863, in the case of *Daniel Shipley, Henry W. Roane, George W. Howard vs. James M. Lester*, 22nd September, 1863, viz. "Stayed by appeal 5th January, 1864. Satisfied order of attorney filed." Service of the notice to

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dismiss is admitted by the appellant's counsel, but no other response made, than that the appellant denies the agreement, and this denial is not supported by affidavit.

The appellant's counsel insists that assuming such an agreement to be made, as is set forth in the affidavits, the appellees' remedy is by application to a Court of Equity, to enjoin the appellant from prosecuting the appeal, and is not a subject of cognizance for the appellate Court.

In *Ward et al. vs. Hollins et al.*, 14 *Md. Rep.*, 166, the whole Court conceded, that "if for a legal and valid consideration, the appellant agreed to withdraw his appeal and not thereafter to appeal, such an agreement would be enforced" by the Appellate Court's dismissing the appeal; but the majority of the Court thought that in the case before them there was no legal and valid consideration, one of the parties thereto having no legal power to bind the persons whom he undertook to represent. The Chief Justice thought the motion to dismiss the appeal ought to be sustained.

This Court alone has power to decide when an appeal will lie in any particular case. 6 *H. & J.*, 143. 1 *Md. Ch. Dec.*, 330. When the appeal has been taken, all agreements by the parties or their counsel are properly within its control. It being a question of jurisdiction, this Court could not recognize the power of other tribunals to determine whether it should be exercised or not, without surrendering its authority as a Court of final resort.

The agreement to abandon the appeal in this case, being for a legal and valuable consideration, executed on the part of the appellees, fully proved to the satisfaction of this Court, and not denied by the appellant under oath or attempted to be disproved, there is no alternative, but to dismiss the appeal.

Appeal dismissed.

(Decided March 14th, 1866.)

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JOHN M. WALKER *vs.* ELEANOR A. ROGERS, EXECUTRIX OF LLOYD N. ROGERS, DECEASED.

PRAYERS, &C.: A REVERSAL OF JUDGMENT NOT ALWAYS CONSEQUENT UPON THE REJECTION OF A CORRECT INSTRUCTION.—It has been repeatedly decided by this Court that a judgment will not be reversed on appeal, if it appears that the law of the case has been correctly laid down for the direction of the jury, or the appellant has not been prejudiced by the instruction actually given, notwithstanding the prayers rejected may have been correct in themselves.

PRAYERS, &C.: COMPENSATION OF AGENT FOR SERVICES RENDERED, RULE AS TO. —In an action to recover the value of services rendered, and the general issue pleaded, where no express contract is proved, and the nature of the employment is to be inferred from the acts of the parties, as—where one is employed by and undertakes to aid and assist another in effecting a sale of property, an instruction offered by the defendant that the plaintiff could not recover unless the jury found that he did "diligently and faithfully occupy his time and render services in aiding R. to effect the sale" is sufficient.

An addition, however, to such prayer by the Court, requiring as essential to the recovery of the plaintiff that the jury should also find "that such services were of advantage and value to the employer in effecting said sale," does not vitiate the prayer, the propositions contained in the prayer and the addition thereto being correlative, and in effect substantially the same.

——: ——: MEASURE OF DAMAGES.—On the question of measure of damages for the services rendered, evidence having been given as to the rate of compensation usually paid in the City of Baltimore for such services, an instruction that the jury "may consider" such evidence in making up their verdict, is in proper form: an instruction that the jury "ought to consider" such evidence, &c., is too peremptory in its terms.

PRACTICE: WITNESS, EXAMINATION OF: EXPERTS, EVIDENCE OF.—Upon the same question, a witness, a property-broker in the City of Baltimore, having been asked the question:—"What, in your opinion, as an expert, would be the value of such services, as proved by the evidence, the plaintiff has rendered the defendant's testator in the City of Baltimore in the year 1860?"—upon objection the question was held inadmissible.

APPEAL from the Superior Court of Baltimore City.

This is an appeal from a decision of the Superior Court of Baltimore city. The suit was instituted by the appellant to recover for services rendered by him to Lloyd N. Rogers, in and about the sale of the Druid Hill estate to the Park Commissioners of Baltimore City.

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1st *Exception.*—At the trial of the cause the appellant to maintain the issue upon his part joined, offered evidence to prove, that he was a property broker in the city of Baltimore; that he was employed by Lloyd N. Rogers to aid him, and to act as his agent, in effecting a sale of the said Rogers' property, called "Druid Hill," to the Park Commissioners of Baltimore city; that the property was offered to the Commissioners by Mr. Rogers himself; that the appellant, during the pendency of the negotiations for the sale of the property, had frequent interviews with Mr. Rogers, and was active, zealous, and even pertinacious in commending said property to the Commissioners, in urging upon them its purchase, and in endeavoring to remove or answer objections made to its fitness and eligibility as a site for the proposed park; that a sale of the property was made to the Commissioners, and that the usual and customary rate of compensation for services, such as were rendered by the appellant in making said sale, was a commission of 2½ per cent. on amount of sales.

There was no evidence that the appellant failed to render faithfully any of the services for which he was employed, but there was proof from two of the Park Commissioners that they purchased "Druid Hill" on their own judgment, and were not induced to make the purchase by the representations or exertions of the appellant.

2nd *Exception.*—In the progress of the trial, the counsel for the appellant asked of a witness, who was a property broker in the city of Baltimore, the following question: "What, in your opinion as an expert, would be the value of such services as proved by the evidence the plaintiff had rendered to the defendant's testator in the city of Baltimore?" The Court (MARTIN, J.,) refused to permit this question to be put, and to this refusal the appellant excepted.

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The following prayer was then offered on the part of the appellant:

"If the jury find from the evidence, that the plaintiff was engaged in the business of a property broker in the city of Baltimore, and that Mr. Rogers, the testator of the defendant, offered certain property for sale to the Park Commissioners of said city, and that he employed the plaintiff to aid and assist him in effecting said sale, either by previous employment, or the acceptance of the plaintiff's agency and the adoption of his acts, and that the plaintiff did diligently and faithfully occupy his time and render services in so aiding him (Rogers) to effect said sale, and a sale of said property to said Commissioners was in a short time made and effected, then the plaintiff is entitled to recover; and if the jury shall find the preceding facts, then, in ascertaining what amount the plaintiff shall recover, the jury ought to consider the rate of compensation which they may find from the evidence was usually paid in said city for services of a like kind, and if they shall not find that there is any particular rate of compensation shown by the evidence to have been usually paid for such services, then the plaintiff is entitled to recover such sum as the jury may find from the evidence is a reasonable remuneration for his said services."

Several prayers were offered on the part of the appellee, which, as they were rejected by the Court below, and no appeal was taken by her, it is not necessary to notice further. The Court below rejected the prayer of the appellant, as well as those of the appellee, and gave the following instruction to the jury:

"I instruct the jury, that if they find from the evidence that the plaintiff was engaged in the business of a property broker in the city of Baltimore, and that the testator of the defendant offered certain property for sale to the Park Commissioners of said city, and that he employed the plain-

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tiff to aid and assist him in effecting said sale, either by previous authority or the acceptance of plaintiff's agency, and the adoption of his acts, and that the plaintiff did diligently and faithfully occupy his time and render services in so aiding him to effect said sale, and a sale of said property to said Commissioners was in a short time made and effected, and that said services were of advantage and value to the defendant's testator in effecting the said sale, then the plaintiff is entitled to recover such sum as the jury may find from the evidence to be a reasonable remuneration to the plaintiff for said services; and in ascertaining what is a reasonable remuneration, the jury may consider the rate of compensation, which they may find from the evidence was usual and customary in the said city for services of a like kind."

The appellant excepted to the rejection of his prayer, and to the instruction given by the Court, and this constitutes the second exception.

I. Nevett Steele and Ferdinand C. Latrobe for the appellant.

1st. It is contended for the appellant that the Court below erred in its rejection of his prayer and in its instruction to the jury,

Because, if a person is employed by another to render certain services or do certain acts, with a view to the accomplishment of a given object, and faithfully renders the services and does the acts for which he was employed, and the proposed object is accomplished, then such person is entitled to recover a reasonable remuneration for his services, and his employee cannot resist the payment of such remuneration, on the ground that the accomplishment of the proposed object was not attributable to, or the result of, said acts and services, and that the object would have been attained without them. By the instruction of the Court

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below, the right of the appellant to recover, was erroneously made to depend on the decision of the question, whether his acts and services had been "of advantage and value" to Mr. Rogers in effecting the sale, so that although as Mr. Rogers' agent he had rendered precisely the services which he was employed to render, yet he could not recover, because the Commissioners in making the purchase acted on their own judgments, and were not conscious of being influenced by him. Mr. Rogers did not choose to run the risk of the Commissioners relying exclusively on their own judgments in making the purchase, but thought proper to guard against and provide for the contingency of their leaning to a greater or less extent on the opinions and representations of others, and ought to pay for the services he required for that purpose. *Chitty on Cont.*, 480, 481.—*Moneypenny vs. Hartland*, 1 *Carr. & P.*, 352, 354. *Howard vs. Holliday, Id.*, 384. *Speaks vs. Sheppard*, 1 *H. & J.*, 84, 85.. *Rodemer vs. Hazlehurst*, 9 *Gill*, 296. *Miles vs. Bernard, Peeke's Addl. Ca.*, 61. *Farmworth vs. Garrard*, 1 *Camp.*, 36. *Underwood vs. Lyceum*, 5 *B. Munroe*, 129. *Murray vs. Currie*, 7 *Carr. & P.*, 584. *Calvert vs. Cox*, 1 *Gill*, 95. *Canby vs. Frick*, 8 *Md. Rep.*, 163.

2nd. It is contended for the appellant, that he had a right to prove by an expert the market value or price in Baltimore of the services rendered by the appellant. *Hays vs. Busk*, 5 *Taunt.*, 521.

J. Mason Campbell and *Daniel M. Thomas* for the appellee.

Upon the first bill of exceptions, the appellee's counsel contended, that the action of the Court below was right in refusing to allow the plaintiff to put the question offered to the witness Harvey. The question was put in a form decided by this Court to be inadmissible. *B. & O. R. R. Co. vs. Thompson*, 10 *Md. Rep.*, 76, 84. *Sills vs. Brown*, 9 *Carr.*

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& P., 601. 1 *Greenlf. Ev.*, *sec.* 440. The proper shape for such a question appears in *Spear vs. Richardson*, 37 *N. H.*, 23.

Besides, apart from any criticism on the form of the question, this was no case for the opinion of an expert. *Norman vs. Wells*, 17 *Wend.* 136–162–163. *Carter vs. Boehm*, 3 *Burr.*, 1905–1913–1918.

The witness having already stated that he knew of no usage in cases of this sort, it was only admissible for him to state facts, from which the jury might estimate the value of the services rendered. *Calvert vs. Coxe*, 1 *Gill*, 95–123–124. *Murray vs. Currie*, 32 *Eng. C. L. Rep.*, 584–641.

Upon the second bill of exceptions, they contended that the plaintiff's prayer was manifestly incorrect, and the Court properly refused to grant it.

1st. Because it took from the jury the question whether the services of the plaintiff were of value to the defendant's testator, in having contributed in any way to the consummation of the sale. *Keener vs. Harrod & Brook*, 2 *Md. Rep.*, 63. *Wilkinson vs. Martin*, 34 *Eng. C. L. Rep.*, 267. *Mexican Cases*, 20 *Howard*, 539. *Hamilton vs. Holliday*, 1 *Carr. & P.*, 384. *Chilton vs. Butler*, 1 *E. D. Smith*, 150. *Carroll's Admrs. vs. Quynn*, 13 *Md. Rep.*, 388.

2nd. Because it made it compulsory with the jury to consider the rate of compensation usually paid for such services, whereas the true rule was to leave it discretionary with the jury to take into consideration or not, such usual rate of compensation. *Calvert vs. Coxe*, 1 *Gill*, 95. *Brown vs. Nairn*, 9 *Carr. & P.*, 204. *Murray vs. Currie*, 32 *Eng. C. L. Rep.*, 267. *Story on Agency*, *sec.* 326. *Canby vs. Frick*, 8 *Md. Rep.*, 163, 168.

If the above views are correct, the instruction given to the jury by the Court below must be sustained, as it is the same instruction asked for the plaintiff, with the qualifications required by the principles above contended for.

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WEISEL, J., dissented in part from the decision of the majority of the Court, and delivered the following opinion:

The appellant was plaintiff below. He sued the appellee in the Superior Court of Baltimore City, in *indebitatus assumpsit*, and declared,

1st. For money payable by the defendant to him. 2d. For work done by the plaintiff for Lloyd N. Rogers, in his life time, at his request, laying damages at $16,000.

The general issue plea, that "the said Lloyd N. Rogers was never indebted as alleged," was put in.

The plaintiff in support of the issue on his part, adduced proof of his occupation as a property broker in the city of Baltimore, in the year 1860; of his employment by Mr. Rogers in relation to the selling to that city of his estate of Druid Hill for a public park; of his efforts with the Park Commissioners in furtherance of the sale, and of the sale made of that estate for that purpose, and then, in proving the value of his services, propounded to one of the witnesses, Mr. Harvey, a property agent in Baltimore, this question, "What, in your opinion as an expert, would be the value of such services as proved by the evidence, the plaintiff had rendered to the defendant's testator in the city of Baltimore in the year 1860?"

To the admissibility of this question the defendant objected, and the Court sustained the objection, declaring at the same time that the evidence of said witness in reply to the question, would not be admissible. The first exception is to this ruling of the Court.

We think the Court committed no error in excluding the question, and the answer it was designed to elicit. It was not propounded to him, assuming that he was an expert, in the proper form. It asked his opinion upon the value of services as proved by the evidence. This assumed the fact that certain services had been rendered, and he was asked

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his opinion as to their value, whilst they were to be found by the jury. The rule is, that where facts are doubtful and remain to be found by the jury, it is improper to ask one examined as an expert who has heard the evidence, what is his opinion upon them, though he may be asked his opinion upon a similar case hypothetically stated. 1 *Greenlf. Ev. sec.* 440. This rule was adopted and distinctly applied by this Court in the case of the *Balt. & Ohio R. R. Co. vs. Thompson*, 10 *Md. Rep.*, 83, 84. See also *Sills vs. Brown*, 9 *Carr. & P.*, 601, *and Spear vs. Richardson*, 37 *N. H.*, 28, 34. Besides, the witness (as shown by his testimony) could not speak as to any usage in cases of the kind then before the jury, and what he knew of prices was only from his own dealings, in cases of a different sort, and that cases of this kind were generally matters of special contract.

All the proof being in, the plaintiff submitted one prayer to the Court, and the defendant four, all of which were rejected, and in lieu thereof the Court gave its own instruction to the jury. To the granting of this instruction, and the refusal to grant his prayer, the plaintiff excepted, and the verdict being against him, he has prosecuted this appeal.

The instruction given by the Court varies in two particulars from that asked by the plaintiff. The principal difference consists in this, that the Court put it to the jury to find, as essential to the plaintiff's recovery, that "the services rendered by the plaintiff were of advantage and value to the defendant's testator in effecting said sale."

Construing this to mean that unless the services so rendered actually promoted or effected the sale, the plaintiff was not entitled to recover, I think the Court erred in giving such an instruction. As a general rule the plaintiff's right to recover on a *quantum valebat* or *quantum meruit*, does not depend upon the advantage or benefit

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which the defendant derives from the article sold or the service rendered. The plaintiff's outlay in time, labor or money is the foundation of the right to recover, and these or any of them, being expended faithfully and diligently in his service, in pursuance of the employment, and for the purpose of accomplishing the proposed object, the defendant cannot rightfully resist a claim for the services on the ground that he received from them no beneficial result. Unless the plaintiff took the risk or placed his right to recover on the contingency that his efforts should actually avail to produce the result, it is difficult to perceive why a faithful and diligent discharge of his duty should not meet with its appropriate reward. If he was not employed to find a purchaser or to effect a sale, but simply to assist in making the sale, and if he did so aid and assist, and a sale was made, he is entitled to such compensation as his services were worth. The plaintiff's prayer and the Court's instruction both go upon the ground that the services were faithfully and diligently rendered. If such had not been the case, but on the contrary one of negligence, unskillfulness and injury were presented, the defendant could rely upon this state of facts either to defeat the action altogether or to reduce the claim. This is the distinction which to my mind pervades all the cases which have been relied upon in this case. *Chitty on Cont.*, 480, 481. *Miles vs. Bernard, Peake's Addl. Cases*, 61. If the agent has done all he was bound to do, he is entitled to compensation. *Hammond vs. Holliday*, 1 *Carr. & P.*, 384. *Murray vs. Currie*, 7 *Carr. & P.*, 584, in which Lord Denman held that where the purchaser stated that he did not buy the estate on account of any character of the plaintiff's office, but from his own observation, yet if the plaintiff found the purchaser, he was entitled to his commission, though another agent made the sale. So in this case, if the plaintiff was engaged to assist in making the sale, and made

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efforts accordingly, though the witness stated that Druid Hill, when seen, sold itself, and such was the fact, this is not to defeat the plaintiff's right to remuneration for whatever services he rendered.

A further objection to the instruction given by the Court was, that it did not sufficiently impose upon the jury the duty of considering the evidence relating to the rate of compensation usually paid in the city of Baltimore for such services, that it left it by the use of the words *may* consider optional with the jury to consider it or not, whereas it was their duty to consider it, not exclusively, but with the other facts upon the subject of damages, and to give to it its proper force if found to have any.

There is no force in the objection when compared with this part of the Court's instruction. The latter does not conflict with it, but presents to the jury with sufficient clearness and force, their duty with regard to the evidence on this branch of the case. It was not binding upon the jury, but they would have the right to look to it in making up their judgment. *Canby vs. Frick*, 8 *Md. Rep.*, 168. In this light the instruction as given in this particular, is regarded and pronounced correct. The language of the plaintiff's prayer in this respect was too strongly put, and for that cause was faulty.

In this view of the case the instruction of the Court below was erroneous, so far as it put it to the jury to find, in connection with the other hypothesis it embraced, that "the services of the plaintiff were of advantage and value to the defendant's testator in effecting said sale;" and the judgment for that cause should be reversed and a *procedendo* awarded.

As this opinion however is not concurred in by a majority of the Court, on the second bill of exceptions, and the judgment below will therefore be affirmed, it is not necessary for me to notice the defendant's prayers.

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BARTOL, J., delivered the opinion of the Court.

Two exceptions were taken to the ruling of the Superior Court in this case; the first involving a question of evidence, the second arising upon the action of the Court on the prayers.

As to the first exception the opinion of this Court is, that there was no error in sustaining the objection to the question propounded to the witness Harvey. Upon this point we all agree with the views expressed by our brother WEISEL, and without adding anything further in support of a proposition that seems to us to be free from difficulty, we rest the decision of this part of the case upon the authorities cited by him in his opinion.

The second exception was taken by the plaintiff below to the rejection of his prayer, and to the instruction given by the Court to the jury.

It has been repeatedly decided by this Court that a judgment will not be reversed on appeal if it appears that the law of the case has been correctly laid down for the direction of the jury, or the appellant has not been prejudiced by the instruction actually given, notwithstanding the prayers rejected may have been correct in themselves.

Here two objections are made by the appellant to the instruction given by the Court below: The first referring to the grounds of the plaintiff's action or right to recover—the second to the measure of damages or rule by which the jury was to be governed in estimating the rate or standard of compensation. The objections will be considered in the order stated.

First, as to the ground of the action. In comparing the plaintiff's prayer with the instruction of the Court, it is not easy to discover any substantial difference between the propositions of law they respectively contain, at least so far as they affected the grounds of the action. The

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theory of the plaintiff's prayer was, that in order to entitle him to recover, the jury must find. 1st. "That he was employed by Rogers to aid and assist him in effecting the sale of the property." 2nd. "That he did diligently and faithfully occupy his time and render services in so aiding him (Rogers) to effect said sale;" and 3d. "That the sale was effected." In the Court's instruction the same propositions are stated in the identical words of the prayer, with the additional words, that "such services were of advantage and value to Rogers in effecting the said sale." To this part of the instruction the appellant objects on the ground that the services of the plaintiff being rendered under his employment, he is entitled to compensation whether Rogers derived any benefit from them or not.

We agree that where a party is employed to do a specified work, and there is no price agreed on, if he does the work he is employed to do, he may recover upon a *quantum valebat* or *quantum meruit* the value of his time and labor without reference to the benefit or advantage actually derived therefrom by the defendant. In such case the whole risk of the work's answering the purpose designed is taken by the defendant. But this case is one of a different sort, growing out of the very nature of the contract sued on. No express contract is proved, but the nature of the employment is to be inferred from the acts of the parties. The plaintiff was not employed as a broker to find a purchaser or to sell the property; according to the theory of the plaintiff's prayer, as well as of the Court's instruction, he undertook to *aid and assist* Rogers in effecting the sale. The plaintiff, by his prayer, conceded that he could not recover unless the jury found that he did "diligently and faithfully occupy his time and render services in aiding Rogers to effect the sale," that is, not merely that he should have had the intention and purpose of aiding and assisting to effect the sale, but that what he

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did should be so done as to have that effect. Now, the Court's instruction, as we construe it, means substantially the same thing. It is impossible that the plaintiff could have rendered aid and assistance, and yet Rogers not have been aided and assisted by what he did. These are correlative propositions, and when the Court told the jury they must find that Rogers received benefit and advantage from the acts of the plaintiff, it stated substantially the same proposition as that contained in the plaintiff's prayer.

The result of the argument of the appellant would be, that although his undertaking was to aid and assist Rogers in effecting the sale, he is entitled to recover, notwithstanding the jury may find that he did not, in fact, aid or assist in effecting the sale.

There was evidence in the cause that the plaintiff represented other property which was offered for sale as a public park, and which entered into competition with the property of Rogers. It was also proper for the jury to consider upon all the evidence whether what was done by the plaintiff in behalf of Rogers was done in such discreet and skillful manner as to promote the object designed. It would not have been proper for the Court to withdraw from the consideration of the jury the question whether the services of the plaintiff were rendered in a negligent or unskillful manner; and no better test of that could be given than whether Rogers derived any benefit or advantage from them.

In *Chitty on Contracts*, 481, the author says, in speaking of the question of skill and diligence of an agent: "But if the principal derive any benefit from the act of his agent, the latter is entitled to a proportionate compensation," and cites the decision of BEST, C. J., in *Hammond vs. Holliday*, 1 *Carr. & P.*, 384. It would follow, of course, in such a case, if no benefit is derived by the principal the

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agent would be entitled to no compensation. The same test was applied by Ld. Ellenborough in *Farnsworth vs. Garrard*, 1 *Camp.*, 38, where the Court said: "The plaintiff is to recover *what he deserves;* it is, therefore, to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him.

We are of opinion that the first objection to the instruction given by the Superior Court in this case is not well founded.

As to the second objection we are all of opinion that the instruction was correct, and on this point we refer to what has been said by our brother Weisel in his opinion—merely adding that the evidence of usage was so vague and indefinite as to make it questionable whether the defendant might not have justly complained of the action of the Court in submitting it to the jury at all. Waiving this point, however, we are clearly of opinion that the plaintiff was not entitled to ask for an instruction to the jury in the peremptory form of the prayer. But inasmuch as the jury have found that the plaintiff was not entitled to recover anything, the appellant would not be entitled to a reversal, even though there was error in that part of the instruction touching only the measure of damages.

Finding no error in the Court's instruction to the jury, the judgment will be affirmed.

Judgment affirmed.

(Decided March 14th, 1866.)

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SAMUEL BLACK *vs.* DAVID CARROLL.

CODE., VOL. 2., ART. 4, SEC. 782, RELATING TO MORTGAGE SALES IN BALTIMORE CITY: PROPRIETY OF DECREE AND VALIDITY OF SALE, WHEN TO BE CONTESTED: PRACTICE IN EQUITY.—The propriety of a decree and the validity of a sale made in pursuance thereof, in a proceeding under the Act of 1833, ch. 181, codified in vol. 2, Art. 4 and sec. 782 of the Code, may be inquired into and contested after the passage of the order of ratification *nisi*, and before the final order of confirmation is passed.

The objection that under the article and section of the Code referred to, a decree may not be entered as well after as before default is not supported, either by the words of the Code or by any decided case.

The plain meaning of these provisions of the Code is, that where the decree is entered before default, no sale shall be made till something is due upon the mortgage; but they do not limit the remedy of the mortgagee to the period before the forfeiture.

——: ——: ——: THE ACT OF 1839, CH. 58, SEC. 3, conferred no new and enlarged power on the Court, nor gave any right to the mortgagee which was not given by the original Act of 1833, ch. 181, but must be taken as merely declaratory of the pre-existing law.

——: ——: ——: ACT OF 1861, CH. 17.—The decree under which the sale in this case was made, was not suspended by the Act of 1861, ch. 17, but came within the exceptions of the 3d sec. of that Act, which expressly excepts from the operation of the Act "decrees or judgments for the payment of interest or tax as between parties to mortgages, judgments or other contracts, upon which said interest or taxes are payable at a specified time or times."

APPEAL from the Superior Court of Baltimore City.

The appeal in this case is from an order of the Superior Court of Baltimore city, overruling objections to a sale made in pursuance of a decree passed under the provisions of the Act of 1833, ch. 181, embodied in the Code, vol. 2, Art. 1, sec. 782, relating to mortgages in the city of Baltimore.

The facts of the case are stated in the opinion of this Court.

This cause was argued before BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

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Benjamin C. Barroll for the appellant.

1. The first objection which appears against the validity of the decree is, that it is not in conformity with the law authorizing an *ex parte* decree to be passed. The Code expressly limits the jurisdiction; the language is, (sec. 782,) "the said Court may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages, or limited for a default of the mortgagors."

The jurisdiction conferred (special) is to pass a decree, before default, for a sale to take place at a period specified in the mortgage. The decree is to be "forthwith," and it is impossible to conform to the express requirements of the law unless the decree precedes the default and the period limited in the mortgage for the forfeiture and consequent right to sell.

Such was the scope of the Act of 1833. And it was only the superadded jurisdiction conferred by the Act of 1839 which enabled the Courts to pass similar decrees after default. This Court so decided in the case of *Kenly vs. Wierman*, 18 *Md. Rep.*, 303. (The Act of 1839 was not re-enacted by the Code.)

2. The second objection to the decree in this case arises out of the restrictions imposed by the Act of 1861, ch. 17, at the special session, which declares that "on all decrees for sale of mortgaged property there shall be a stay of execution and sale for twelve months from the passage of this Act." And upon all powers to sell contained in any mortgage, the stay is declared to operate—the remedial operation of the law being made as broad as language can express it. It is prohibitory—clearly and emphatically so.

The complainant seeks to shelter himself under the proviso in relation to "personal property," but the meaning is manifestly "chattels," and not property, which is

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immovable and not liable to waste or destruction by removal or inattention; in other words, the term was meant to apply to perishable property, as that word is commonly understood, and did not embrace interests in real estate.

The complainant further suggests (in the record) that he is within the terms of the third section, *i. e.*, that the decree in question is a decree "for the payment of interest." But the petition, claim, and all the proceedings expressly negative such proposition.

In order to avail of the third section, the decree on its face must show it to be for interest due, especially when a Court is exercising a special, carefully defined jurisdiction. The law in question is remedial in the highest sense and every intendment is to be made to promote its humane purpose.

The appellant suggests that you cannot avail of this third section with regard to interest without proof of the fact in advance of the decree. The law requires not mere allegations, but evidence legally introduced in order to entitle the Court to pass the decree for sale; *prima facie* the jurisdiction to pass such decree does not exist, and the evidence therefore must precede the exercise of the power by the Court. If the jurisdiction of the Court is not perfect at the time when the decree is signed, no subsequent act or evidence can give it efficacy.

It is also not unworthy of note that the proviso with regard to interest is confined by the express language of the law to the parties to the mortgage. Assignees of such parties are not included in the designation, and it does not necessarily follow, that they can avail of the exception. The proper construction of the language used seems to imply that all others were excluded, and specially intended so to be.

The appellant respectfully insists that the harsh and anomalous process allowed under these special mortgage

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Acts justifies the strictest scrutiny into the exercise of the power and jurisdiction of the Court ordering the sale. If rightful in all respects, the jurisdiction and sale will be sustained by the Appellate Court, but in these cases there are no equitable intendments, the right of the mortgagee is "*strictissimi juris*," and he is held to the very letter of the law.

Leven Gale for the appellee contended,

1. That the provisions of the Code do authorize a decree to be passed as well after as before default. 2 Code, 307, &c. Act 1833, ch. 181. Act 1839, ch. 9. 3 Dorsey's Laws, 2322. *Williams vs. Williams*, 7 *Gill*, 302. *McDowell vs. Goldsmith*, 6 *Md. Rep.*, 319. *S. C.*, 2 *Md. Ch. Dec.*, 370. *Ing vs. Cromwell*, 4 *Md. Rep.*, 31. *Hays vs. Dorsey*, 5 *Md. Rep.*, 99.

2. That the appeal should have been taken from the original decree so far as the first objection is concerned. 7 *Gill*, 302. 5 *Md. Rep.*, 99. 6 *Md. Rep.*, 319. 2 *Md. Ch. Dec.*, 370.

3. That in this case, interest notes being due and unpaid, the right to sell was given by the 3d sec. of the Act of 1861.

4. That the Act of 1861, ch. 17, was unconstitutional as invalidating contracts. 1 *How.*, 319. 2 *do.*, 612.

Bartol, J., delivered the opinion of this Court.

The appeal in this case is from an order of the Superior Court of Baltimore city, ratifying a sale made in pursuance of a decree passed under the provisions of the Code, volume 2, Art. 4, section 782; embodying the provisions of the Act of 1833, ch., 181, relating to mortgages in the city of Baltimore.

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Two exceptions to the ratification of the sale were filed by the appellant.

1st. That the decree was not passed in accordance with the provisions of the Code.

2nd. That the execution of the decree was suspended by the Act of 1861, ch. 17.

The appellee contends that this not being an appeal from the decree, the appellant is not entitled to be heard upon the first exception. We do not concur in this view. It has been repeatedly decided by this Court that in such cases an appeal may be taken from the decree; but it has never been held that the validity and regularity of the decree may not be inquired into upon exceptions to the sale. In *Eichelberger vs. Harrison*, 3 *Md. Ch. Dec.*, 89, the late Chancellor held that the proceeding under the Act of 1833 "was contemplated to be *ex parte*, until after the decree and the sale under the decree, and that the propriety of the decree, and the validity of the sale made thereunder, were to be inquired into and contested after the passage of the order of ratification *nisi*, and before the final order of confirmation should be passed."

In this opinion of the Chancellor we entirely concur. We refer also to *Hays vs. Dorsey*, 5 *Md. Rep.*, 99, in support of this opinion.

The only objection to the decree relied upon in this case, under the first exception, is that it was entered after default, and for that reason, it is alleged to be contrary to the provisions of the Code, which the appellant contends authorize a decree only before default. This objection is not supported either by the words of the Code or by any decided case. By the Code it is provided that the proceeding may be taken at any time after the filing of the mortgage to be recorded, and the Court is authorized "thereupon forthwith to decree that the mortgaged premises shall be sold at any of the periods limited in the conveyance for the for-

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feiture of the mortgage, or limited for a default of the mortgagors." The plain meaning of this provision is that where the decree is entered before default, no sale shall be made till something is due upon the mortgage. But there is nothing in the language that limits the remedy of the mortgagee within the period before the forfeiture; on the contrary, the proceeding is authorized to be taken "at any time" after the recording of the mortgage, without regard to the time limited therein for a default of the mortgagor. He is protected against a sale until he makes default; but there is nothing in the words of the Code that denies to the mortgagee the benefit of the remedy after the default has occurred. This in our opinion is the plain meaning of the law, and if the question were now presented for the first time, we should have no difficulty in adopting this construction. But it is supported by several decisions of this Court in cases arising under the Act of 1833, ch. 181, which in this respect was identical with the provisions of the Code.

In *Ing vs. Cromwell*, the proceeding was instituted after default, and the decree was affirmed. 4 *Md. Rep.*, 31, 36.

In *Hays vs. Dorsey*, 5 *Md. Rep.*, 99, which was also a proceeding under the Act of 1833, a decree passed after default was affirmed. It is supposed by the appellant's counsel that no power to pass a decree after default was conferred by the Act of 1833, because, by the 3rd section of the Act of 1839 ch. 58, it was enacted "that the decree authorized by the second section of the Act of 1833 may be passed as well after as before the period limited in the mortgage for the payment of the debt, or for the foreclosure of the mortgage." Looking at the words of the Act of 1833, it is not easy to discover why the third section of the Act of 1839 should have been passed; as it is apparent that the latter does not confer any new or enlarged power on the Court, or give any right on the mortgagee which was not given by the

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original Act. The Legislature may have had some doubt as to the construction of the Act of 1833, but as there was no good ground for that doubt, the third section of the Act of 1839 must be taken as merely declaratory of the pre-existing law, and therefore the appellant's objection derives no force from the fact that the third section of the Act of 1839 has not been embodied in the Code.

The case of *Kenly vs. Wierman's Ex'r.*, 18 *Md. Rep.*, 302, has been cited and relied on by the appellant's counsel, as one express decision that under the Act of 1833 no power was given to enter a decree after default; a brief examination of that case will show that the opinion of the Court has been misconstrued.

The only question there involved was whether the mortgage upon which the decree had been passed contained the assent of the mortgagor to the passage of a decree according to the provisions of the Act of 1833 and its supplements; and this Court being of opinion that the terms of the mortgage did not authorize the summary proceedings under the Act, the decree was reversed. The case turned altogether upon the construction of the mortgage in this particular. What was said in the opinion of the Court with regard to the Acts of 1833 and 1839, must be understood as referring to the question involved, and was designed to express the idea that by both Acts, the assent of the mortgagor was required. It may be proper to add in explanation of that part of the opinion, that the particular question now under consideration did not arise in the case, and there was no intention on the part of the Court to declare that a decree might not be passed under the Act of 1833, after default as well as before, provided the mortgage contained the assent of the mortgagor, in such terms as the Act prescribed.

In the opinion of this Court, the objection of the appellant to the decree in this case was properly overruled by

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the Superior Court. We are also of opinion that the exception to the sale, based on the Act of 1861, ch. 17, was properly overruled.

The appellant in the argument of the cause, has made the point, that the Act of 1861 was a law impairing the obligation of contracts, and therefore unconstitutional and void, and in support of this view has cited the cases of *Bronson vs. Kinsey*, 1 *Howard*, 319, and *McCracken vs. Hayward*, 2 *Howard*, 608. Upon this question we express no opinion. It is one of great delicacy and importance, and ought not to be passed upon, unless absolutely necessary for the determination of the case. Here there is no such necessity, because this case clearly falls within the saving provisions of the third section; and assuming the Act to be free from objection on constitutional grounds, the sale may be supported under the third section, which expressly excepts from the operation of the Act, "decrees or judgments for the payment of interest or tax as between parties to mortgages, judgments or other contracts, upon which said interest or taxes are payable at a specified time or times."

The record before us shows that the decree was rendered in part for interest and taxes due under the mortgage, upon which there was no stay of execution under the act of 1861, and for which the property was liable to be sold. The property mortgaged was in one parcel, indivisible, and could therefore be sold only in its entirety. No valid objection therefore can be made to the sale under the decree.

An order will be signed affirming the order appealed from with costs to the appellee and remanding the cause.

Order affirmed, and cause remanded.

(Decided March 17th, 1866.)

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CHARLES W. FRANZ *vs.* THE TEUTONIA BUILDING ASSOCIATION, No. 2.

ACT OF 1833, CH. 181: RELATING TO MORTGAGES IN BALTIMORE CITY: DECREE. OBJECTIONS TO.—The objection to a decree passed in pursuance of the Act of 1833, ch. 181, and its supplements, that it was passed *after* default, and therefore improperly, was overruled in the preceding case, *Black vs. Carroll, ante p.* 251.

——: ——: ACT OF 1852, CH. 148: INCORPORATION OF HOMESTEAD OR BUILDING ASSOCIATIONS: ESTOPPELS.—The objection to such decree that it does not appear by averment or proof that the plaintiff was incorporated pursuant to the provisions of the Act of 1852, ch. 148, cannot be taken advantage of by a defendant who has recognized its existence and right to sue in accordance with the Act of 1852, by executing to it a mortgage.

——: ——: ACT OF 1825, CH. 50: CERTAIN MORTGAGES EXCEPTED FROM ITS OPERATION.—The objection to said decree, that the mortgage upon which it was passed was void by the Act of 1825, ch. 50, because of the uncertainty as to the time for which it may exist, and of the amount to be paid under it, does not apply, it appearing to the satisfaction of the Court, from the mortgage itself, that the mortgagor was a member of the Association, and within the exception of the 7th sec. of the Act of 1852.

APPEAL from the Circuit Court for Baltimore City.

This is an appeal from a decree of the Circuit Court of Baltimore City, passed in pursuance of the provisions of the Act of 1833, ch. 181, and its supplements.

A bill or petition was filed in the Court below on the 20th of September, 1862, by the appellee, in these words:

"The bill of complaint of the Teutonia Building Association, No. 2, humbly shows that a certain Chas. Franz, by his indenture of mortgage which is herewith filed, marked exhibit A, to be taken as part of this bill, assigned the property therein particularly described to the said Association, for the purpose of securing the payments and the prompt performance of the covenants and obligations in the said mortgage mentioned. Your orator further shows that the said Charles Franz is greatly in arrear, having failed to make the said payments and to perform the covenants in the said mortgage mentioned for more

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than three months. Your orator says the said mortgage contains the assent of the said Charles Franz, for the passage of a decree for the sale of the said mortgaged premises. And your orator prays that your Honor will pass a decree for a sale of the said mortgaged premises, to the end that the claim of your orator, which is herewith filed, marked exhibit B, and prayed to be taken as part of this bill under said mortgage, may be paid out of the proceeds of such sale, with costs and proper expenses; and that your orator may have such further relief as the nature of its case may require."

The mortgage filed with the bill is dated the 8th of June, 1857, and witnesseth that in consideration of the sum of $936, paid by the said Association to Franz, he conveys a leasehold interest in a lot in Baltimore city, particularly described, to the said Teutonia Building Association, No. 2, with the proviso that it is the intent of these presents that the mortgage shall be void if Franz shall well and truly pay and perform the payments and obligations hereinafter recited to be paid and performed by him; and Franz then covenants with the Association: 1st. To pay to it, and its successors and assigns, six dollars per week, for each and every week succeeding the date of these presents, and in addition thereto the interest on the sum of $2,400, to be received monthly in equal instalments for each and every month succeeding the 8th day of August, 1867, until such time when it shall appear by the books of the said Association that there is sufficient money in hand, and in actual possession of the same, to pay each unredeemed share of its stock to the holders thereof, $200 clear of all losses and liabilities of said Association. 2nd. To keep the property insured, pay all the ground rents and taxes thereon, and also all fines imposed on him by the Association. It then provides that each and all of these obligations shall continue until the time when the afore-

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said stock shall be worth $200 for each unredeemed share; but on his failing to make said weekly payments and the monthly interest as before stated, "and any such default continuing for three months from the time of default," then the mortgaged property "shall be sold by a trustee to be duly appointed, and the proceeds of sale shall be applied" to pay: 1st, the costs and expenses of the sale, and all arrears of ground rent, taxes, &c.; 2d, to the Association all arrears of weekly payments and monthly interest due and unpaid, according to the stipulations of the mortgage; and 3rd, the balance of the proceeds shall be deposited in some bank, and applied from time to time the said weekly sums and monthly interest as they become due in manner as they are required by the mortgage to be paid by said Franz, and the balance, if any, to him, his executors, administrators and assigns. "And the said Charles Franz, his executors, administrators or assigns, to secure and enforce the payments and conditions hereinbefore, and as hereinbefore on the part of himself, his executors, administrators or assigns to be paid and performed, hereby declares his assent for the passing of a decree for the sale of the hereby mortgaged property and premises under and conformable to the Act" of 1833, ch. 181, "or in case of default made by him in any of the conditions of this mortgage, does hereby empower the said Building Association, or its attorney, to sell the property and premises hereby mortgaged in the manner prescribed in the Act of 1836, ch. 249, or any other Act or Acts supplementary of either of the Acts herein referred to."

The Court, (KREBS, J.,) on the same day the petition was filed, (20th September, 1862,) passed a decree directing the mortgaged property to "be sold," appointing a trustee to make the sale in the usual form, prescribing the terms of sale at one-half cash and the balance in four months, directing the proceeds to be brought into Court,

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and providing that before a sale shall be made, a statement of the mortgage claim, duly verified by affidavit as required by law, be filed in said cause, and any stay created by the stay-laws shall have ceased to operate. From the decree this appeal was taken by Franz.

The cause was argued before BOWIE C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

O. Miller for the appellant.

This decree having been affirmed *nisi* under the rules of this Court, the appellant, by his counsel, for cause against an absolute affirmance, shows and insists:

1st. That the decree is not warranted by the terms of the mortgage. It was passed after default, and therefore to be sustained there must be on the face of the mortgage an assent to its passage, under the Act of 1839, ch. 9, the 3rd section of which authorizes the passage of the decree after as well as before default. The original Act of 1833, ch. 181, sec. 2, contemplates only a decree before default, and hence the necessity of the passage of the supplemental Act of 1839. Now the assent given in this mortgage is only for a decree under the original Act of 1833. It was clearly competent for the parties so to contract, and that such was their intention is evident from the fact, that provision is made for proceeding under the Act of 1836, ch. 249, in case of default made. There is no assent to the passage of a decree under the supplemental Act of 1839. The plain reading of the instrument, and the obvious intention of the parties to it, is this: the mortgagee should have power, in order to secure and enforce the mortgage, to obtain a decree at once, as soon as the mortgage was executed and recorded, before default made, under the Act of 1833, but if the mortgagee did not choose to take this course, but waited

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until after default made, he should then proceed under the Act of 1836. The mortgage does not say he shall have the choice of either remedy, but carefully excludes such a conclusion. The mortgagee has the absolute power to obtain a decree under the Act of 1833, which must under that Act be obtained before default, but the mortgage does not say he may proceed under that Act or its supplement of 1839, after default; the words are, "or in case of default" made by the mortgagor he empowers the mortgagee, "or its attorney," to sell the property "in the manner prescribed in the Act of 1836, ch. 249, or any other Act or Acts supplementary to either of the Acts herein referred to." The only reference to any supplement to the Act of 1833 is in these latter words, but there is no supplement to that Act which authorizes or prescribes a mode by which the mortgagee or its attorney can sell mortgaged property. The Act of 1833 and its supplements, provide only for a sale by a trustee appointed by a decree of the Court. The Act of 1836, and its supplements, provide for a sale after default by the mortgagee or some person authorized by him, without the aid of a decree, and without any application to any Court. It is therefore submitted that the appellee was bound by the terms of this mortgage to proceed under the Act of 1836, having waited until default was made before obtaining a decree under the Act of 1833, and the Court below had not, at the time this decree was passed, jurisdiction or authority to pass the same.

On this point as to the construction of the Acts of 1833, ch. 181, and its supplement of 1839, ch. 9, see the case of *Kenley vs. Wierman's Excrs.*, 18 *Md. Rep.*, 302.

2nd. But another objection is this: There is no special Act incorporating this Association, and authorizing it to sue by the corporate name of "The Teutonia Building Association, No. 2," and it therefore has only a right to come

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into Court under the Act of 1852, ch. 148. Now, the first section of that Act grants authority to individuals under any name by them assumed, to associate for the purpose of organizing or establishing Homesteads or Building Associations, and being so associated shall, on complying with the provisions of this Act, be considered a body politic and corporate, and as such shall be capable in law to hold and dispose of property, &c., have and use a common seal, &c., choose officers and enact by-laws, &c., may sue and be sued, plead and be impleaded, answer and be answered in any Court of Law and Equity, and do all other acts, &c., provided, however, that before any such corporation shall be entitled to the privileges of this Act, they shall lodge with the Clerk of the Circuit Court, &c., a copy of the articles of association of such corporation, signed by at least seven members, and certified by the Secretary thereof, to be recorded in the office of such Clerk. In other words, it is expressly enacted that no such Association shall have the privilege of suing in any Court of Law or Equity, unless it has complied with this condition. No such Association can cross the threshold of any Court of Law or Equity in this State without taking its credentials along with it. It must show itself entitled to sue either by proof or averment. But here there is neither in the petition nor bill, nor in the mortgage nor anywhere else in the record, an averment even that this Association had complied with the provisions of the Act of 1852; there is not even an averment or any recital in the mortgage, that it was duly incorporated. In the total absence of any proof, or any averment, or any recital in the mortgage to this effect, the Court below had no jurisdiction to pass this decree. The proceedings being *ex parte*, and the decree being passed the same day the petition was filed, and without notice, there was no other mode of taking advantage of this objection except by an appeal.

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In the case of *Robertson vs. The American Homestead Association*, 10 *Md. Rep.*, 397, the mortgage recited that the Association was "duly incorporated," so that the mortgagor was estopped from setting up this objection in that case.

3rd. Again, it is submitted that this mortgage would be void under the Act of 1825, ch. 50, on account of the uncertainty of the time for which it may exist, and the amount that may be paid under it, and can only be saved by being brought within the terms of the 7th section of the Act of 1852, ch. 148. But that section only authorizes such mortgages to be made by members of the Association. Now neither the mortgage, nor the bill nor petition in this case, recite or aver that the appellant was a member of this Association. Such an averment or recital to that effect in the mortgage was necessary, in order to render it a valid mortgage upon which a decree could be passed under the Act of 1833, or its supplements. In *Robertson's case*, 10 *Md. Rep.*, 397, the mortgage recited that Robertson was a member of the Association. The recital in that mortgage, is "whereas the said Jesse Robertson is a member of the said Association, the same being a body corporate duly incorporated."

Alexander Wolff for the appellee.

1. The mortgage is properly executed, and contains the appellant's assent to a sale in the following words:

And the said Charles Franz to secure and enforce the payment and conditions hereinbefore mentioned, and as hereinbefore recited, on the part of himself, his executors, administrators or assigns, to be paid and performed, hereby declares his assent for the passing of a decree for the sale of the hereby mortgaged property and premises, under and conformable to the Act of the General Assembly of Mary-

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land, passed at December session of the year 1833, chap. 181, &c., entitled an Act relating to mortgages, or in case of default made by him in any of the conditions of this mortgage, does hereby empower the said Teutonia Building Association, No. 2, or its attorney, to sell the property and premises hereby mortgaged, in the manner prescribed in an Act of the General Assembly aforesaid, passed at December session in the year 1836, ch. 249, &c.

2. The appellant was in arrear for over three months, as proven by the account.

3. The appellant empowered the appellee to foreclose the mortgage at any time after a default in making the payments secured by the mortgage, in the following words:

And the said Charles Franz failing to make the said payments of weekly sums of money, and the monthly interest on the entire amount received, as hereinbefore recited to be paid, or failing to perform any of the said obligations as hereinbefore stipulated to be performed, and any such default continuing for three months from the time of the default, then the hereinbefore described property shall be sold, &c.

James Revell also for the appellee, in reply to the appellant's first point, argued as follows:

1st. The 3rd section of the Act of 1839, ch. 9, enacts, "That the decree authorized by the second section of the Act to which *this is a supplement*, may be passed as *well after as before* the period limited in the mortgage for payment of the debt, or for the foreclosure of the mortgage." Now, if the appellant gave his assent to a sale under the supplement to the Act of 1833, to wit: the Act of 1839, I would ask how (ignoring for the present the Act of 1836) could a sale be effected without a decree? He clearly gave his assent to a sale under any Act supplementary to the Act of 1833, and a sale under this last mentioned Act could not be obtained except by a decree under said Act of 1833. Can a proposition be clearer?

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But, again, the Act of 1839, ch. 9, being *in pari materia* with the Act of 1833, ch. 181, *must be construed* with that Act, or, in the language of the books, "*as if they were one law;*"—"the latter Act may be considered as incorporated with the former." *Earl of Ailesbury vs. Patterson, Dougl.*, 30. *Dwarris on Statutes, (side paging,)* 699 *and* 700, *and authorities in note. Mayor of Balto. vs. Howard,* 6 *H. & J.*, 383. *The Canal Company vs. The Rail Road Company,* 4 *G. & J.*, 1. *Dugan vs. Gittings,* 3 *Gill,* 138. *Ranoul vs. Griffie,* 3 *Md. Rep.*, 60.

The case of *Kenley vs. Wierman's Executors,* 18 *Md. Rep.*, 302, cited by the appellant's counsel, is not in point, as will appear by an examination of the record and report of the cases;—there the terms of the mortgage were very dissimilar to the present case, and it is respectfully submitted, an argument is not required to show the dissimilarity. If any inference is to be drawn from the case cited applicable to this case, it is to the effect that the Acts of 1833 and 1839 are to be construed as one.

2nd. In reply to the appellant's 2nd point. The Act of 1833 and its supplements, contemplated a summary proceeding; the mortgage and covenants were the solemn act, under seal, of the appellant;—the right to obtain a decree for sale of the mortgaged premises was distinctly and unequivocally accorded to the appellees;—the power to sue is expressly recognized, and yet, in the face of all this, the appellant, instead of resorting to his remedy by injunction, in case of fraud or other improper act upon the part of the association, or by bill of review, gravely asks an appellate Court to perpetrate nothing short of a fraud upon the rights of this association, by permitting him to deny his own solemn *act* and *deed*. By this act of his, he is estopped from setting up such a plea; has waived, by his solemn acknowledgment, all objections to the capacity

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of the association to covenant with him. *Wesley vs. Thomas*, 6 *H. & J.*, 29. *Congregational Society vs. Perry*, 6 *N. H.*, 165. *Den vs. Van Houten*, 5 *Halstead*, 274. *Dutchess' Cotton Man. Co. vs. Davis*, 14 *Johnson, N. Y., page* 243. *Hennings vs. Dutch West India Co.*, 2 *Ld. Raym.*, 1535. *John vs. Farmers & Mechanics' Bank*, 2 *Blackf.* (*Ind.*) 367. *Hughes vs. Bk. of Somerset*, 5 *Little*, (*Ky.*,) 47. *Tar River Nav. Co., vs. Neal*, 3 *N. C.*, 526.

The true principle of estoppel, as applicable to deeds, is to prevent circuity of action, and to compel parties to fulfill their contracts. *Casey's Lessee vs. Inloes, et al.*, 1 *Gill*, 430. *Bonner vs. Wilkinson's Executor*, 5 *Barn. & Ald.*, 682.

The Act of 1852, ch. 148, authorizes the formation of "Homestead or Building Associations," by complying with certain provisions, one of which is, that the articles of association shall be recorded. The object of this is to give notice to the world; and this record, for the purposes of the association, is as much a matter of public notoriety as an Act of Assembly. The appellant has admitted by his deed, that the "Teutonia Building Association," No. 2, has an existence. The presumption of law is, therefore, that it is duly incorporated, and being duly incorporated, has the right to *hold and dispose of property* both *real and personal*, to sue and be sued, &c. *Hagerstown T. R. Co. vs. Creeger*, 5 *H. & J.*, 122. *Commonwealth vs. Woelper, and others*, 3 *Sergt. & Rawle*, 29.

3rd. In reply to the appellant's third point.

Although the mortgage does not recite or aver in direct language that Franz was a member of the association, yet its terms, conditions and covenants, plainly indicate the fact. But the averment or recital was unnecessary, for the following reasons:

1st. There is nothing in the Act of 1852, which prevents

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an association organized under its provisions, to take a mortgage from a *non-member;* as one of the rights, incident to its incorporation, is under the very terms of the *first* section of said Act, to *hold and dispose* of property *both real and personal. Plank Road Co. vs. Young*, 12 *Md. Rep.*, 476, &c.

2nd. The mortgage in question contains on its face the amount, and fixes the time and mode of payment.

3rd. For the reasons assigned in reply to second point of appellant.

4th. Because the Court of Appeals in the case of *Robertson vs. The American Homestead Association*, 10 *Md. Rep.*, 408, cited by the appellant's counsel, say "that the mortgage in this case, (somewhat similar to this,) is *not* within the provisions of the Act of 1825, ch. 148, or if it be, that Act is repealed, *pro tanto*, by the Act of 1852, ch. 148."

GOLDSBOROUGH, J., delivered the opinion of this Court.

The appeal in this case is taken by the appellant from a decree of the Circuit Court of Baltimore City, passed on the 20th day of September, 1862, pursuant to the Act of 1833, ch. 181, and its supplements.

The objections urged by the appellant to this decree are 1st, that the decree was passed *after* default.

2nd. That it does not appear by any averment in the appellee's petition or by proof, that the appellee was incorporated pursuant to the provisions of the Act of 1852, ch. 148.

3d. That the mortgage on which the decree was passed would be void under the Act of 1825, ch. 50, on account of the *uncertainty* of the time for which it may exist, and the *amount* that may be paid under it, unless saved by the 7th section of the Act of 1852, ch. 148, and that section only authorizes such mortgages to be made by members of the association. The 1st objection is removed by the decision

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of this Court pronounced at the present term in the case of *Samuel Black vs. David Carroll, p.* 251. As to the second objection, we think the appellant is precluded from making it by his own act. By his mortgage he recognizes the right of the appellee to sue in accordance with the Act of 1852. *In* 6 *N. H. Rep.*, 165, the Court say "the giving of the note is an admission by the defendant of the existence of the corporation, and he cannot now be permitted to deny that there is a duly organized corporation." See also 5th *Halstead N. J. Rep.*, 274. This was a case of a mortgage, and it is said, "the mortgage under his hand and seal is as against him, sufficient evidence of the existence of the corporation." *In* 14*th John's Rep.*, 243, where the decision turned on the law of New York, similar to the Act of 1852, it is said by the Court "this is a public law and the certificate becomes a matter of record. The defendant having undertaken to enter into a contract with the plaintiffs in their corporate name, he thereby admits them to be duly constituted a body politic and corporate under such name."

The 3rd objection is covered by the case of *Robertson vs. The American Homestead Association*, 10*th Md. Rep.*, 397, as to the question of uncertainty of time for which it exists, and the amount that may be paid under the mortgage.

As to the question whether the 7th section of the Act of 1852, authorizes such mortgages as the one under which the decree in this case was passed by members only, we do not deem it material to determine whether the appellee was authorized to take mortgages from others not members. In our opinion, the terms of this mortgage clearly import that the appellant was a member of the association.

Finding no error in the decree of the Circuit Court, we will sign a decree affirming it with costs to the appellee and remand the cause for further proceedings.

Decree affirmed, and cause remanded.

(Decided March 20th, 1866.)

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BALTIMORE & OHIO R. R. CO. *vs.* STATE, USE OF KELLY ET AL.

In an action under the Act of 1852, ch. 299, by the wife for damages consequent upon the death of the husband, resulting from the carelessness of the defendant, a rail road company, evidence was given of the age, habits, health and occupation of the deceased at the time of his death, and also of the number of his family and their condition before and after his death, but no evidence was offered of the specific wages paid the deceased at the time of his death, HELD:

That a prayer—"That in the absence of proof, other than the death, age and condition of health, and members and state of the family of said deceased, of actual damage, the verdict of the jury, in the event of its being for the plaintiff, must be for nominal damages only"—was properly rejected.

2nd. That in assessing the damages the jury should confine themselves to such compensation to the surviving members of Kelly's family as would supply to them the same results as would have followed from his labor during the probable period he would otherwise have lived and earned a livelihood; but that they might take into consideration his age, health and occupation, and the comfort and support afforded his family at the time of his death.

APPEAL from the Superior Court of Baltimore City.

This action was brought by the appellee, in the Superior Court of Baltimore city, to recover damages under the Act of 1852, ch. 299, for the killing of a certain William Henry Kelly.

Exception.—The plaintiff to maintain the issues on his part joined, at the trial of the cause offered evidence tending to prove:

That the deceased was one of the employees of the Baltimore and Ohio R. R. Company before and on the 20th July, 1857; and that on said day he was killed "by being caught and crushed between an engine and tender, on the former of which he was at work;" that the company's agent in charge of the locomotive that caused the accident was incompetent for his place; that said locomotive was defective, and that the company had knowledge of said facts; that said Kelly was at the time of his death from thirty to thirty-six years of age; a sober, moral, industrious

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man, enjoying good health; that he left surviving him a widow, a son about five years old and a mother, which survivors were the *cestui que uses* in the present action; that for about four years prior and up to the time of his death, said Kelly kept house in Baltimore, supporting his wife and child, who lived with him; that he left little or no property; and that since his death his widow had supported herself and child by her own exertions.

It was further proved that said Kelly had been for four years prior to and up to the time of his death employed by the company as one of the hands in the boiler shop at Mount Clare; that he was an industrious man, a good hand, &c. "There was no proof of the specific wages paid to Kelly at the time of his death."

No prayers were offered by the plaintiff below; seven prayers were offered by the defendant, all of which were granted by the Court except the fifth, which was in these words:

"That in the absence of proof, (other than the death, age and condition of health, and members and state of the family of said Kelly,) of actual damage, the verdict of the jury, in the event of its being for the plaintiff, must be for nominal damages only."

To the refusal of the Court (MARTIN, J.,) to grant this fifth prayer the defendant excepted, and the verdict being for the plaintiff, this appeal was taken.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

John H. B. Latrobe for the appellant.

The prayer in question was suggested by the belief that, with the power to prove what the wages were, the plaintiff was unwilling to show that they are comparatively small, and went before the jury at a venture. Now, the

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rule of law is well known, that the best evidence of which a case is susceptible must be produced where practicable. 2 *Stevens' Nisi Prius*, 1509. The question here was as to the amount that would compensate the widow and children for the loss they had sustained.

Punitive damages were not claimed; no prayer was offered by the plaintiff asking for them. The naked question was the compensatory damages. To ascertain what would be the best proof of them we must look at the elements properly entering into the calculation; these were:

1st. The age of the party and the probable length of life, during which he would be able to earn a support for his family, in a case where, like the present, his family was dependent on his daily labor. Sufficient evidence to this extent, it admitted, was given.

2nd. The wages of such a person at the time of his death. These, unquestionably, ought to have been shown, when the jury would have had the elements for a fair conclusion as to the actual pecuniary loss sustained by the widow and children in consequence of the death. It stands to reason that the widow and children of a man, say, for illustration, at ninety cents a day, suffer less pecuniary damage from the loss of the husband and father than the widow and children of a man earning two dollars a day would suffer.

The verdict in this case was for $5,000. The income from this at six per cent. is $300 per annum in perpetuity, which will be the income paid to the plaintiffs if the present verdict stands; when, allowing even that the earnings of the deceased were one dollar per day, and that he would never have lost a day until he was sixty years of age, (a most improbable supposition.) The plaintiff, had he lived, would have had such an income for twenty-five years only, and from this income even there would have had to have

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been deducted the cost of his own support. In other words, the finding of the jury in the case is a perfect illustration of the importance of the best evidence where it can be procured, where damages purely compensatory in their character are sought.

The exception to the rule requiring the best evidence is the case where it is impossible to obtain it. But here there was no difficulty of the sort.

The authorities seem to be conclusive that the verdict, if for more than nominal damages, must be based, not merely on the fact of the death, but upon data which the jury may weigh in coming to a pecuniary result.

The Maryland Act is, in the main, taken from Lord CAMPBELL'S Act, 9 and 10 Victoria, ch. 93, and on this several decisions have taken place in England, showing that the pecuniary loss is the only loss to be considered. *Armsworth vs. South Eastern R. R. Co.*, 11 *Jurist*, 758. *Gilbard vs. The Lancashire and Yorkshire R. R. Co.*, (*See Chitty on Carriers*, 413. *Blake vs. the Midland R. R. Co.*, 83 *Eng. C. L. Rep.* *See also New York vs. Ransom*, 23 *How.*, 487.

A. W. Machen and *R. J. Gittings* for the appellee.

The only question is, whether the Court below was justified in rejecting the defendant's fifth prayer. There is no question of the plaintiff's right to recover, nor as to the amount of the verdict if actual damages were allowable; for the jury were properly instructed upon the measure of damages, and the *quantum* was a matter for their own determination, subject only to the discretion of the Superior Court on a motion for a new trial.

The defendant's fifth prayer demanded a peremptory instruction to the jury, that in finding for the plaintiff they must give nominal damages only.

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1. It is a conclusive objection to the prayer that in pronouncing that there was no evidence of actual damage, other than the death, age and condition of health, and members and state of health of the family of William H. Kelly, the deceased, it altogether excluded the material facts, that by means of his labor he was keeping house and supporting his family, who by his death were thrown upon their own exertions.

The prayer has the vice condemned in the second prayer of the defendant in *Planters' Bank vs. Bank of Alexandria*, 10 *G. & J.*, 350, 351, 357, and in the prayer contained in the fourth exception in *Byer vs. Etnyre*, 2 *Gill*, 162.

2. The statute of 9 and 10 Victoria, ch. 93, adopted—with modifications immaterial to the present inquiry—in our own Act of 1852, ch. 299, has now received a settled construction in England. If the deceased himself, had he not been killed, could have sued, there is a foundation for a case against the defendant. The extent to which the actual plaintiffs can recover depends upon another consideration, viz: Their reasonable expectation of pecuniary benefit from the continuance of the life of the person killed. They do not recover as his executors, (although in England the action is in the name of the executor,) nor is the *quantum* of damages fixed by the injury to his estate. And their expectation does not need to be founded on a right—if it is a reasonable expectation this is all that is required. *Dalton vs. South Eastern R. R. Co.*, 4 *C. B. N. S.*, 296. 93 *Eng. C. L. Rep.*, 296.

In every trial there are some things which may be safely left to implication from matters of general knowledge. This rule of evidence, which is common to all jurisprudence, is well stated by Domat. "Some facts are such that they are always reputed to be true till the con-

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trary has been proved; and there are others which are always reputed contrary to truth, unless they are proved. 1 *Domat by Cushing*, § 2070, (1 *Dom. Loix. Civ. L.*, 3 *s.*, 4 *pl.*, 7.) It was upon this principle it was held in *Fay vs. Prentice*, 1 *C. B.*, 828, 50 *Eng. C. L. Rep.*, 728, that the jury might find that rain fell in a certain garden at Islington, in Middlesex, sometime during the interval between the 1st of May and the 2nd of July, in the year 1844, although no evidence of the fact had been offered.

The tortuous killing being established, only two things, as we have seen, were necessary to make up the claim to damages: 1st, that the person killed, if he had survived, would have been able to render pecuniary assistance to the parties for whose use the suit was brought; and 2nd, a reasonable probability that he would have bestowed such benefits.

The proof in this case more than supplies the demands of the law.

Now, as to the worth of that support and maintenance, including as to the child, his education also, the jury had before them the age and habits of the parent, the age of the child, and especially the condition or station in life of all the parties. Who can say that the pecuniary value to a wife and her child five years old, of the support, which, during the child's minority at least, and the mother's life time, they would have continued to enjoy in the household of a laboring man of the character of Kelly, living in the degree of comfort which we all know belongs to such homes in our favored city of Baltimore, was not worth five thousand dollars? But, be this as it may, such support has some actual value, and the question of amount was for the jury. *Duckworth vs. Johnson*, 4 *Hurls. & Nor.*, 653, 657. *Dorsey vs. Gassaway*, 2 *H. & J.*, 413. *Fishwick vs. Sewell*, 4 *H. & J.*, 403. *Gaither vs. Blowers*, 11 *Md. Rep.*, 552, 553. *Oldfield vs. N. Y. &*

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Harlem R. R. Co., 3 *Smith*, 103. *Same case on appeal in* 14 *N. Y. Rep.*, (4 *Kernan*) 310.

The only case relied upon by the learned counsel of the appellant in support of the theory of his fifth prayer, *The Corporation of New York vs. Ransom*, 23 *How.*, 487, has, we submit, no bearing on the present question. It is only necessary, however, to refer to *Seymour vs. McCormic*, 16 *How.*, 485, the case mentioned in the opinion of the Court in *The Corporation of New York vs. Ransom*, as the foundation of their judgment, to perceive that there is no analogy between that class of patent cases, and actions for personal injury and killing like the present. So far as there is anything common in the law applicable to them it is of the most elementary and undisputed description. Whatever is novel in the decisions under the patent law, proceeds upon grounds peculiar to the subject matter.

As to the other cases cited by the defendant's counsel, *Blake vs. the Midland R. R. Co.*, 88 *Eng. C. L. Rep.*, 93, (also on the appellee's brief,) it only settled that the verdict is not to be regulated by the idea of giving a *solatium* for mental sufferings. Our jury were so instructed. *Armsworth vs. The South Eastern Railway Co.*, 11 *Jur.*, 758, (also cited by Mr. Latrobe,) one of the earliest cases upon Lord CAMPBELL'S act—a *nisi prius* ruling of Baron PARKE'S—though less important now than formerly, when there were no decisions in banc on the subject, is still instructive as illustrating how impracticable it must always be to take away a reasonable freedom of judgment from the jury. The whole passage forming the close of the learned Judge's charge, of which the first sentence is extracted in the brief of the appellant, is far from justifying any inference adverse to the appellee.

The rule requiring the production of the best evidence, which seems to be invoked by the counsel of the appellant, has no application to such a case as the present. All the

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evidence here brought into comparison is of the same quality, and the rule has nothing to do with the question of the quantity, or amount of proof. That less evidence is offered than might have been adduced, or that weaker proofs have been selected in preference to stronger, or that there has been an omission to supply all the proofs capable of being produced, constitute no infringements of it. *Richardson vs. Milburn*, 17 *Md. Rep.*, 67, 71. 1 *Phill. Ev.*, 570. The operation of the rule, where it applies, is as a rule of exclusion—it excludes certain evidence because some better evidence is presumed to be behind, and justice refuses to listen to that which is of inferior quality. But here there is no exception to the admission of any of the evidence which was actually introduced. The other, and, as the learned counsel of the appellant contends, less satisfactory evidence, did come in, and it came in without objection. So it is too late to appeal to the rule. 1 *Phill. Ev.*, 567. 1 *Stark. Ev.*, 641.

3. But, at any rate, simply refraining from instructing the jury to give only nominal damages was not error, the Court having already given positive instructions as to the measure of damages, which, if followed and applied by the jury, were sufficient to keep them within just bounds.—*Pennsylvania R. R. Co. vs. Ogier*, 35 *Penn.*, 60. Consistently with the instructions given, the jury could not award real damages unless they were due.

4. There was evidence also from which it was competent to the jury to find that gross carelessness on the part of the defendant in the management of its dangerous machinery which, according to the rule of law forcibly expounded in *Hopkins vs. The Atlantic & St. Lawrence R. R.*, 36 *N. H.*, 1, is equivalent, in these great railroad corporations, to bad motives, and equally justifies the exaction of exemplary damages. And for this reason, besides others, the defendant had no right to require the Court to prohibit the jury

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from going beyond nominal damages. *Penn. R. R. Co. vs. McCloskey*, 23 *Penn.*, 531.

In conclusion, relying on the points and authorities mentioned in the brief, as well as the additional cases above referred to, we submit that there was evidence of actual damage, and that the Court, after giving every instruction which the defendant asked for the guidance of the jury, as well with respect to the liability of the company, as the rules for estimating the damages, committed no error in refusing to confine the jury in a case of such character to merely nominal damages. *Britton vs. South Wales R. R. Co.*, 3 *Hurls. & Nor.*, 963.

COCHRAN, J., delivered the opinion of this Court.

This suit was brought by the appellee, under the Act of 1852, ch. 299, to recover damages resulting from the death of William Kelly, which it is alleged was caused by negligence on the part of the appellant. The exception, on which the case was brought up, contains evidence of the age, habits, health and employment of the deceased, at the time he lost his life, and also of the members of his family; that he supported them by his labor, and that after his death his widow supported herself and child by her own exertions.

All the prayers of the appellant were granted excepting the 5th; and by the 7th, the last of the series, the jury were instructed that in assessing the damages they should confine themselves to such compensation to the surviving members of Kelly's family, as would supply to them the same results as would have been afforded by his labor during the probable period he would otherwise have lived and earned a livelihood; but that they might take into consideration his age, health and occupation, and the comfort and support afforded his family at the time of his being killed.

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The proposition submitted by the 5th prayer, to the rejection of which this exception was taken, was that, in the absence of proof as to the wages or earnings of Kelly, no standard was shown by which the jury could find the amount of damages sustained, and that their verdict should, therefore, have been for nominal damages only.

Vindictive or punitive damages were not claimed, and, indeed, as we have recently held, punitive damages are not recoverable in such a case as this, under the Act of 1852. But looking to the concession made in the 7th prayer, that the jury might, in assessing the damages, take into consideration the age, health and occupation of the deceased, as well as the comfort and support afforded by him to his family, it is a little difficult to understand why the appellant should be allowed to insist on the doctrine propounded by the rejected prayer. Without, however, disposing of the question on that ground, let us inquire whether this prayer is otherwise free from objection.

It is admitted that there was no evidence of the specific wages paid to Kelly at the time of his death, although there was proof of the character of his occupation, as well as of the fact that he was in the employ of the appellant. The prayer goes on the theory, that the rate of wages, paid at the time of the death, was the true and exclusive standard of the damages sustained, and, in the absence of proof on that point, that nominal damages only could be recovered. So far as we have been able to learn, this proposition is not only unsupported by any direct authority, but too strict in its character to admit of general application. The adoption of it in this case, would have withdrawn from the consideration of the jury a mass of evidence that tended to show the nature and extent of the damages actually sustained. Suppose, for instance, that Kelly was out of employment at the time he was killed, or that he was then

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pursuing some occupation affording a livelihood for himself and family, yet of a character not to show the specific amount derived from it, could it be pretended, that being out of employment, or that the want of proof of the amount derived from the occupation pursued, would have the effect of limiting the right of recovery to nominal damages only? We do not understand that to be the rule. In *Franklin vs. South Eastern Railway Co.*, 3 *Hurls. & Nor.*, 211, the action was brought to recover damages under the Act from which our Act of 1852 was derived, and POLLOCK, C. B., in delivering the opinion of the Court, said that "it was clear that damage must be shown, for the jury are to give such damages as they may think proportioned to the injury. It has been held, that these damages are not to be given as a *solatium*, but are to be given in reference to a pecuniary loss. It is also clear, that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss. If then the damages are not to be calculated on either of these principles, nothing remains, except that they should be calculated in reference to a reasonable expectation of a pecuniary benefit, as of right or otherwise, from the continuance of the life." In *Dalton* against the same defendant, 93 *Eng. C. L. Rep.*, 296, it was said "that the reasonable expectation of pecuniary advantage by the relation remaining alive, may be taken into account by the jury, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned." In *Duckworth vs. Johnson*, 4 *Hurls. & Nor.*, 652, the action was brought by a father for damages resulting from the killing of his son, and there the question was whether the plaintiff had sustained damage that entitled him to recover. There was proof that the son had previously earned four shillings a week, but that he was out

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of employment at the time of his death. POLLOCK, C. B., again said, "It is true no distinct evidence was given of the value of the boy's services, and the cost of boarding and clothing him; but as to that, the jury were better able to judge than we are. It having been decided that a reasonable prospect of pecuniary benefit may be taken into consideration, it is impossible for us to say, that the jury were not warranted in finding the verdict which they have done." The general doctrine of these cases is applicable here, and they clearly show that there was no error in rejecting this prayer. They also support the proposition of the 7th prayer as the true law of the case.

Judgment affirmed.

(Decided March 22nd 1866.)

CHARLOTTE LEVY AND SAMUEL LEVY *vs.* WILLIAM W. TAYLOR.

INJUNCTION BOND, ACTION ON: DISCHARGE OF SURETY.—The obligation of a defendant, surety in an injunction bond upon which suit is brought, is not discharged by the admission of other parties, as complainants, to prosecute the cause in which the injunction was issued—the bill for injunction being at the same time a creditor's bill.

——: ——: INJUNCTION BOND, CONSTRUCTION OF.—In construing such bond with reference to the question of the discharge of the obligation of the surety, the Court will be guided by the intention of the parties when the bond was executed, taking into consideration that the bill was filed by creditors in behalf of themselves and others who might come in, and that the bond was given in a judicial proceeding, as a necessary step to obtain the writ of injunction, and to indemnify the adverse party against its effects and operations.

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The condition of the bond was co-extensive with the objects and purposes of the bill, and the admission of new parties did not enlarge the responsibility of the obligors. The risk incurred by the surety when there was but one party complainant, was as great as when the number was increased.

MEASURE OF DAMAGES IN ACTION ON INJUNCTION BOND.—Where the injunction prayed by the bill was to prevent the defendants from selling, disposing of, or intermeddling with certain goods, and to obtain a decree applying the same to the payment of the debt of the complainants and others, the amount properly recoverable in an action on the injunction bond, is the loss in value of the goods during the operation of the injunction,—not exceeding the penalty of the bond with interest thereon from the time of the institution of the suit.

PRACTICE: EVIDENCE, ADMISSIBILITY OF IN PART WHEN OFFERED IN MASS.—When an offer is made of a mass of evidence complex in its character, and the whole of it is objected to, in such case if any part of it be admissible it is error to exclude the whole. The *onus* lies upon the objector to point out the inadmissible portions of the proof offered, and to take the instruction of the Court as to them.

EVIDENCE, ADMISSIBILITY OF.—The introduction of an entire record as evidence of an adjudication between the same parties of the validity of a mortgage, with reference to the question of damages, is inadmissible, the validity, &c., of the mortgage not being involved in the issue in the cause.

PRACTICE IN COURT OF APPEALS: ORIGINAL JURISDICTION.—The Court of Appeals can only act upon exceptions to proof taken below, and it is not its province to decide upon the admissibility of evidence submitted to it primarily by agreement of counsel to be read subject to exceptions. Such action pertains to the Court of original jurisdiction, and the appellate Court can only review that action on appeal.

APPEAL from the Superior Court of Baltimore City.

This is an action upon the injunction bond filed in the case of *Rich et al. vs. Levy*, reported in 16 *Md. Rep.*, 74, the record of which case is by agreement to be treated as if set out in the several bills of exceptions. The plaintiffs, now appellants, were the defendants in that case, and the appellee, who in this action was sued, together with Rich, who was not found, became a party complainant in that case in the progress of the proceedings. The material facts of the case are stated in the opinion of this Court.

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The cause was argued before BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

R. Gilmor, Jr., and *A. W. Machen* for the appellants.

The three rulings of the Court below upon the evidence, as appears from the 1st, 2nd and 3rd exceptions, were all of them erroneous. 1 *Stark. Ev. by Shars.*, 258, 392, *Marg. Com. Dig. Ev.* (*A.* 4.) *Layborn vs. Crisp*, 4 *M. & W.*, 320. 3 *Inst.*, 173. *Bull. N. P.*, 227, 228. 1 *Greenlf. Ev.* § 511. *Leake vs. Marquis of Westmeath*, 2 *Mood. & Rob.*, 394. *Pegg vs. Warford*, 7 *Md. Rep.*, 582. *Taney vs. Bachtell*, 9 *Gill*, 209. *Marshall vs. Haney*, 4 *Md. Rep.*, 498. *Budd vs. Brooke*, 3 *Gill*, 198. At all events, the defendant could not be prejudiced by the evidence in the mode in which it was offered, and had no right to object. *Hardey vs. Coe*, 5 *Gill*, 189.

The fourth and last bill of exceptions brings up the prayers and instructions. The plaintiff's 2nd, 3rd and 4th prayers, which were refused, present questions of the measure of damages recoverable upon a bond such as is here sued on, and under the circumstances of this case. The defendant's 2nd prayer which was granted, went to annul the bond itself, and preclude all recovery.

II. 1. The loss of value sustained by the goods during the operation of the injunction and while they were in the custody of the Court under it, as prayed in the bill, was clearly recoverable; and the plaintiff's second prayer ought to have been granted. *Wallis vs. Dilley*, 7 *Md. Rep.*, 237. *Rubon vs. Stephan*, 25 *Miss.*, 253.

2. The action being necessarily joint, and made so by the form of the bond, any damages sustained by either of the plaintiffs were recoverable. *Wallis vs. Dilley*, 7 *Md. Rep.*, 237. *Pugh vs. Stringfield*, 93 *Eng. C. L. Rep.*, 364. (4 *C. B. N. S.*) *Bird vs. Washburn*, 10 *Pick.*, 223. Loss of debt, or interest, sustained by Samson Levy, (except in so

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far as covered by the plaintiff's 2nd prayer,) was therefore a proper element of damage, and the plaintiff's 3rd prayer was also free from objection in other respects. *Wood vs. Fulton*, 2 *H. & G.*, 71, 78. *Ives vs. Merchants' Bank*, 12 *How.*, 165. *Hughes vs. Wickliffe*, 11 *B. Mon.* 209. *Carter vs. Thorn*, 18 *B. Mon.* 613. *Tryon vs. Robinson*, 10 *Rich., S. Car.*, 160. *Aldrich vs. Reynolds*, 1 *Barb. ch.* 613.

3. The plaintiff's 4th prayer ought not to have been rejected. *Willson vs. Lancashire R. R. Co.* 9 *C. B. N. S.* 632, 99 *Eng. C. L. Rep.* *Ward vs. Smith*, 11 *Price*, 19. *Wallis vs. Dilley*, 7 *Md. Rep.*, 237, 250, 251.

III. 1. The admission of new parties was provided for by the bill, and the bond is framed with reference to the bill; and what took place therefore was clearly within the contemplation of the contract. *Strawbridge vs. Balt. & Ohio R. R. Co.*, 14 *Md. Rep.*, 360. *Oswald vs. Mayor of Berwick*, 3 *Ell. & Bl.*, 653, (77 *Eng. C. L. Rep.*,) *affmd.* 5 *Ho. Ld. Ca.*, 856. *Mayor of Dartmouth vs. Silly*, 7 *Ell. & Bl.* 97, (90 *Eng. C. L. Rep.*, 1.) 2 *Wms. Saund.* 414, *a* 145 *Vesey vs. Mantell*, 9 *M. & W.*, 323. *Benjamin vs. Hilliard*, 28 *How.*, 149.

The structure of the bill, as a creditor's bill, indeed made all the creditors parties, in a certain sense, from the beginning. *Adair vs. The New River Co.*, 11 *Ves.*, 444. And the actual intervention of other creditors effected no substantial change—certainly none which the character of the proceedings does not show was originally contemplated. The bond must be construed as one given in such a suit. *Shepherd vs. Togwood, Turn. & Russ.*, 391. *Doogan vs. Tyson*, 6 *G. & J.*, 458.

An injunction has the same scope and operation whether granted at the instance of one or of several complainants.

If the view taken on behalf of the appellee be correct, the law provides no compensation for the damages occa-

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sioned antecedently to the admission of the new plaintiffs; a new bond would not cover them.

3. The burden of the obligors was in no manner increased by the admission of co-complainants. With them in, Rich had the same power to prosecute the injunction as before. If they had not come in, and he had died, the injunction would still have remained to require prosecution in order to save the bond. *Hawley vs. Bennett*, 4 *Paige*, 163.—*Carter vs. Washington*, 1 *Hen. & Munf.*, 203. *Fowler vs. Scott*, 6 *Eng., Ark.*, 675.

The liability of the surety is never affected—at law, at least—unless the change in the position of the principal is in some manner the act of the obligee. *U. S. vs. Howell*, 4 *Wash. C. C.*, 620. *Davey vs. Pendergrass*, 5 *Barn. & Ald.*, 187. *Reese vs. Berrington*, 2 *Ves. Jun*, 542. 2 *Wh. & Tud. Le. Ca. Eq.*, 817.

But it is a conclusive objection to the instruction given below that it omits to take into view the essential element in the rule of equity in question, that the change in the contract of the principal has been effected without the consent of the surety. It has been uniformly held both at law and in equity, that if the variance be with his consent he cannot object. 2 *Wh. & Tud., Le. Ca. Eq.*, 824, 828, *Marg. Bank of Steubenville vs. Leavitt*, 5 *Hamm.*, 214. *Baldwin vs. Western Reserve Bank*, 5 *Hamm.*, 274. *Hunter's Adm. vs. Jett*, 4 *Rand.*, 107. 2 *Amer. Le. Ca. 4th Ed.*, 413, 414. *Sprigg vs. Bank of Mount Pleasant*, 14 *Pet.*, 201. *Woodcock vs. Oxford & Worcester R. R. Co.*, 21 *Eng. L. & E. Rep.*, 285; 1 *Drewry* 521. Even the subsequent assent by the surety, has been held to preclude him from objecting. *Smith vs. Winter*, 4 *M. & W.*, 466. *Hargraves vs. Parsons*, 13 *Id.*, 561. Impossibility of performance will not discharge the surety if it arise from his own act. *Hurlstone on Bonds*, 9 *Law Lib.*, 49 *Marg.* The

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fact, therefore, that the admission of the other creditors was made by the Court upon the application of the appellee himself, and that he is one of them, effectually precludes him from asserting that the obligation of the bond is impaired.

Thos. S. Alexander and *Wm. Schley* for the appellees.

The only question supposed to be open on this appeal, presented by the instruction given by the Superior Court to the jury, as stated on page nineteen of the printed record, admits that the obligation of the defendant, as surety to the bond on which this action is brought, was discharged by the order of the Circuit Court for Baltimore City, passed on the 14th of April, 1857, and admitting certain other parties as complainants, with the said Rich, to prosecute the aforesaid equity cause, and that as the said writ of injunction was prosecuted with effect from the time of the issuing thereof continually until the passing of the aforesaid order, then verdict ought to be for the defendant.

In support of this instruction the appellee insists:

1st. That the appellee, as surety for Rich, undertook that Rich, so long as he remained sole complainant, and could control the proceedings in the cause, should prosecute the injunction with effect. That the obligation of his bond was discharged by the act of the Court in admitting others as complainants without his consent, and with the acquiescence of the defendants to unite with and control Rich in the prosecution of the cause, and as the supposed breach took place after the admission of those other parties, there can be no recovery therefor against the appellee.

That the obligation of a surety is defined by the letter of his bond and is not to be extended by equitable con-

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struction, was settled in *Lord Arlington vs. Merrick*, 3 *Saund*, 411. As illustrative of the same rule, the appellee will rely on the cases referred to in the notes to that case, and also on *Union Bank vs. Ridgely*, 1 *H. & G.*, 327. *State vs. Wayman*, 2 *G. & J.*, 254. *Leggett vs. Humphreys*, 21 *How.*, 76—where it is strictly declared that the obligation of a surety is *stictissimi juris*, and therefore that a surety for A, as clerk to B, is not bound for the fidelity of A, as clerk to B and C. *United States vs. White*, 4 *Wash. C. C.*, 414. *Miller vs. Stewart*, 9 *Wheat*, 680. *Bonar vs. McDonald*, 1 *Law & Eq.*, 1. *N. W. R. Co. vs. Whinray*, 26 *Law & Eq.*, 488. *Kitson vs. Julian*, 30 *Law & Eq.*, 326.

To show that an abatement of suit determines the obligation of the bond. *Ormond vs. Birely*, 12 *Mod.*, 380. *Morris vs. Matthews*, 2 *Adol. & Ell., N. S.*, 293.

2. That the liability of the appellee, as surety, is not affected by the circumstances that he was one of the new parties coming in under the order of the Court.

The appellee's counsel cited also the following authorities in support of the above propositions: *Rich vs. Stewart*, 1 *Beav.*, 512. *Reese vs. Berrington*, 2 *Wh. & Tud. Le. Ca., Pt. II.*, 707. 17 *Eng. Cond. Ch. Rep.*, 16. *Arlington vs. Merrick*, 3 *Saund., Rep.*, 414, *n.* 5, *and* 415, *a. n. and g. Leighborn vs. Crisp*, 4 *Mees. & Wels.*, 320. *Planters' Bk. vs Sellman*, 2 *G. & J.*, 230.

WEISEL, J., delivered the opinion of this Court.

The suit in this case being upon an injunction bond, and the defendant (the appellee) being the surety in the bond, he, after oyer, pleaded general performance and for a further plea, that whilst the writ of injuntion was in full force and effect, a certain William W. Taylor and others named, filed their petition in the cause in which

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the injunction was prayed and granted, praying for leave to become parties complainants with Thomas R. Rich, the original complainant therein, which said leave was granted by order of the Court of April 14, 1857, admitting the petitioners as co-plaintiffs, who, with the said Rich, did thereafter rightfully prosecute and control said suit. These pleas were accompanied with an agreement of the parties that on the trial of the issue joined on the replication to the plea of general performance, the defendant should be at liberty to rely on the matters averred in the second of the pleas, so far as they were legally admissible as a defence. It was also agreed that the said William W. Taylor, mentioned in the second plea as one of the petitioners, to be made co-plaintiffs in the proceedings for the injunction, was the same William W. Taylor who is the defendant in this action, both parties to have the benefit of the record and proceedings of the case of Rich against these appellants in the Circuit Court for Baltimore City, and in the Court of Appeals of Maryland, (so far as the same might be legally admissible for the purpose,) and of any facts provable thereby. The record of the proceedings here referred to is the record of the cause in which the injunction was granted upon the bond sued on in this case. That cause resulted in a decree of the Circuit Court for Baltimore City dismissing the bill and dissolving the injunction, which, upon an appeal to the Court of Appeals, was affirmed with costs.

In the progress of the trial three exceptions were taken by the plaintiffs to the ruling of the Court below, upon offers made by them of the record of said chancery proceedings, as evidence before the jury, which will be noticed and disposed of hereafter.

The evidence in the cause being closed, the plaintiffs submitted four prayers for instructions, all of which were

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refused except the first. The defendant also offered one prayer, which was granted; and the verdict being for the defendant, the plaintiffs, having excepted to the granting of the defendant's prayer, and the refusal to grant their 2nd, 3d and 4th prayers, as well as to the rulings of the Court upon the offers of evidence above referred to, appealed to this Court.

The defendant's prayer will be first disposed of. By granting it the Court instructed the jury that the obligation of the defendant, as surety in the bond sued on, was discharged by the order of the Circuit Court for Baltimore City, passed on the 14th of April, 1857, admitting other parties, as complainants with the said Rich, to prosecute said equity cause, and that as the writ of injunction was prosecuted with effect from the time of the issuing thereof continually until the passing of said order, the verdict ought to be for the defendant.

In support of this instruction it was contended by the counsel of the appellee that he undertook only in a case in which Rich was sole complainant, who alone could control the proceedings in the cause, and who, whilst he remained sole complainant, did prosecute with effect, and thus performed the condition of the bond; that the omission of other parties to prosecute deprived Rich of his power to control the cause, and placed a restraint upon his disposition or capacity to compromise or dismiss the suit. In this way the defendant's responsibility was affected to his prejudice, and the nature of the suit, so far as he was concerned, materially changed.

In this view we do not concur, and think the Court below erred in the instruction given. The authorities relied on by the appellee on this point are only examples of the well-settled doctrine that the liability of a surety is not to be extended by implication beyond the terms of the contract, and that any dealings by a creditor with his

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principal debtor, which amount to a departure from the contract by which the liability of the surety is enlarged without his consent, will discharge the surety. Whilst this is well established law, it is equally settled that the intention of the parties when the bond was executed is to guide in its construction, and to arrive at this, the nature of the contract, the purposes to be accomplished by it, and the character of the proceedings, of which it forms a part, will be regarded. *Strawbridge vs. Balto. & Ohio R. R. Co.*, 14 *Md. Rep.*, 366, 367. In this case the bond was given in a judicial proceeding as a necessary step to obtain the writ of injunction, and to indemnify the adverse party against its effects and operation. The bill in equity was a creditor's bill filed by the complainant, Rich, in express terms "on behalf of himself and all other creditors of Charlotte Levy, who should come in and contribute to the expenses of the suit." It thus provides expressly for the admission of the parties. Apart from this, the proceeding was subject to the rules of chancery practice, in such cases for the making of other and proper parties. The condition of the bond, in its recital, referred to the bill of complaint, and stated its object to be to obtain the writ of injunction to restrain the obligees from doing certain things particularly mentioned in it. These were to prevent the parties, defendants to the bill, from selling or disposing of, or intermeddling with certain goods in a store, and that the Court might by its decree apply these effects to the payment of the debts of the complainant and *the other creditors* of Charlotte Levy. The condition of the bond was co-extensive with the objects and purposes of the bill, and the admission of new parties did not enlarge the responsibility of the obligors. The risk incurred by the surety when there was but one party complainant to the bill was as great as when the number was in-

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creased. The possibility that Rich, as sole complainant, might have made better terms is mere conjecture. To meet this it might be said that the new parties might control him in procuring a more favorable result. Such speculations lead to no certain or definite conclusion. 77 *Eng. C. L. Rep.*, 664. And this case is the more strong against the surety, inasmuch as he himself applied to be made a party complainant in conjunction with the other petitioners, and thereby assented to the act which he complains of as enlarging his responsibility.

We think the second prayer of the plaintiffs presented the proper rule of damages, and ought to have been granted.

The third was properly rejected. Whatever damages were sustained arose from the loss or the deterioration in the value of the property that was tied up by the injunction. Samson Levy's interest in that was as mortgagee. If the loss of his security was the loss of his debt, he would obtain all he would be entitled to in the difference of value in the property itself. The suit being joint, the damages must be joint, and any special loss that he, as mortgagee, could sustain, ought not to be included in the general estimate or sum of damages.

The fourth prayer presents the general rule correctly, but it should have limited the jury to a sum within the penalty, and in this is defective and was rightly refused.

We recur now to the offers of testimony by the plaintiffs, as embraced in the three first exceptions. These had reference to the introduction and use of the record and proceedings of the chancery suit between Rich and the Levys, of which the injunction bond in this suit formed a part. Their applicability for some purposes of the trial is obvious enough. The difficulty arose in the manner of getting what was proper and applicable before

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the jury. The parties by agreement had provided for their introduction into the cause, and their use, so far as the same might be legally admissible for the purpose, and the benefit of any facts provable thereby. In such a case, what is the proper mode of bringing before the jury the portions of the record which either party may claim as evidence in support of the issue on his part? We think that this Court has laid down the rule very explicitly in the cases of *Budd vs. Brooke*, 3 *Gill*, 220, *and Carroll's lessee vs. The Granite Manf. Co.*, 11 *Md. Rep.*, 408. The fact that the subject matter in this case was a judicial record makes no difference, in our judgment, in the application of the rule. In the former of the cases referred to a variety of proof was offered, and the defendant objected to all for the purpose offered, and prayed the Court to reject it, but the objection was overruled and the evidence allowed to go in as offered. And in this, this Court on appeal pronounced the ruling of the Court below correct. "Instead of its specifying the parts of the testimony (said the Court) to which the objection was intended to apply, the Court was called upon to reject it in mass. If any part of it, therefore, was admissible for the purpose for which it was offered, the Court in overruling the prayer (to reject it) committed no error. Where an entire prayer, made to the Court, is good in part, and bad in part, that is, which the Court ought to grant in part and in like manner refuse, had the subject matter been properly divided, and a distinct prayer made on each subdivision, the Court is not bound to assume, what appropriately belongs to the counsel, the duty of analyzing the subject matter of the prayer, and admitting that which ought to be granted, and rejecting that which ought not; but the Court may content itself in granting or rejecting the prayer, according to its merits, as presented in its entirety. There was no error, therefore, in the Court's opinion complained of, some of the

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evidence objected to being undeniably admissible." And for this were cited 1 *Pet.*, 338, *and* 13 *Pet.*, 310. And in the case of *Carroll's lessee*, 11 *Md. Rep.*, 408, this Court used this language: "After evidence has been admitted, and an application is made to the Court to exclude it, then the *onus* rests upon the party making the application, to confine his objection to that portion of the evidence which is illegal. And the same rule applies when an offer is made of a mass of evidence complex in its character and the whole of it is objected to. In such case, if part of it be admissible, it is error to exclude the other." *See also Pegg vs. Warford*, 7 *Md. Rep.*, 604, for a re-assertion of the same rule.

Applying this rule, therefore, to the first exception in this case, we think the Court erred in refusing the evidence generally offered to be read. The *onus* lay upon the objector to point out the inadmissible portions of the proof offered, and to take the instruction of the Court upon such, and declining or failing to do so, the plaintiffs were entitled to the proof as offered.

We do not perceive how the validity, fairness and consideration of the mortgage from Charlotte to Samson Levy was involved in the issue in this case, and the rejection by the Court of the plaintiffs' offer in the second bill of exceptions was therefore correct.

Regarding the offer in the third exception as generally and substantially the same as that in the first bill of exceptions, it is to be governed by the same rules and share the same fate with it. The subsequent propositions of the counsel, as detailed in it, do not change the character of the offer. The defendant by them endeavored to shift the *onus* of designating the portions of the proof to be read upon the plaintiffs, whereas it was his duty to point out what was inadmissible. The Court therefore erred in excluding the proof as offered by the plaintiffs.

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Some agreement seems to have been entered into for the submission to this Court of certain portions of the record which were read, subject to exceptions, for our opinion as to their admissibility or not. This Court can only act in such cases upon exceptions to the proof taken below, and it is not our province to scan evidence thus presented and pass upon its applicability. That pertains to the Court of original jurisdiction, and we can only review its action in the premises.

We think the Superior Court of Baltimore City erred in its rulings in the first and third exceptions of the plaintiffs, and in refusing the plaintiff's first prayer and granting the defendant's prayer in the fourth bill of exceptions. The judgment below must therefore be reversed and a *procedendo* awarded.

Judgment reversed and procedendo awarded.

(Decided March 22nd, 1866.)

FAUST FREIDENRICH AND OTHERS, GARNISHEES OF SPRINGER & FRIES, *vs.* ROBERT MOORE AND CHARLES MOORE, USE OF ROSS CAMPBELL.

ATTACHMENT ON WARRANT: MOTIONS TO STRIKE OUT JUDGMENT NISI AND TO QUASH ATTACHMENT: IGNORANCE OF GARNISHEES: FRAUD, DECEIT AND IRREGULARITY: ACCOUNT, WHEN TO BE FILED: RETURN OF SHERIFF AS TO AMOUNT LAID: INQUISITION UNNECESSARY.—In a case of attachment on warrant laid in the hands of S., F. & Co., the defendants being returned *non est*, and the garnishees having failed to appear, a judgment of condemnation *nisi* was entered against the latter. After judgment the garnishees appeared and moved that the same be stricken out and set aside "for fraud, deceit and

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surprise and irregularity in obtaining the same," and subsequently moved, "to quash the attachment because the accounts on which the defendants are alleged to be indebted to the plaintiffs, were not produced and filed with the affidavits made by the plaintiffs before the Justice who issued the warrant of attachment," HELD:

1st. That ignorance on the part of the garnishees of the necessity of appearing in Court and contesting the attachment affords no sufficient ground for striking out the judgment.

2nd. That to justify the striking out of the judgment it would be necessary that clear and convincing proof should be given that the garnishees were prevented from making their defence by deceit practiced upon them by the plaintiffs, lulling them into the belief that the attachment had been or would be abandoned.

3rd. That it is immaterial whether the account which was produced was obnoxious to the objection urged against it by the garnishees or not, as the objection was not made in time.

4th. That the return of the Sheriff that he had laid the attachment in the hands of the garnishees, &c., without stating to what amount, is sufficient, the garnishees having been informed by the service of the writ what was the amount of the plaintiffs' account.

5th. That it is not usual or necessary for the Sheriff to state in his return for what amount he has laid the attachment in the garnishees' hands, although that form has sometimes been observed.

6th. That a failure of the garnishees to appear entitled the plaintiffs to the judgment *nisi*, which in such a case is a motion of course, and no inquisition is necessary.

APPEAL from the Superior Court of Baltimore City.

Attachment on warrant, issued on the 22nd of February, 1859, and laid in the hands of the appellants, as garnishees, trading in the city of Baltimore under the partnership name of Springer, Friedenrich & Co.

The facts of the case are fully stated in the opinion of this Court.

The cause was argued before BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

J. Mason Campbell and *Daniel M. Thomas*, for the appellants, argued.

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1st. That the attachment ought to be quashed for irregularity, because the indebtedness of the defendants upon which the attachment is based is not properly established.

2d. That the judgment of condemnation against the garnishees is irregular, as there is nothing in the cause upon which such judgment can be founded.

3d. That the judgment was obtained by fraud, deceit and surprise practiced upon the said garnishees by the plaintiffs, and ought therefore to be set aside.

1st. In support of the first proposition upon which the motion to quash is based, they referred to the Act of 1795, ch. 56, sec. 1, which requires the creditor applying for an attachment to produce before the officer before whom he makes his affidavit of indebtedness, "the bond or bonds, bill or bills, protested bill or bills of exchange, promissory note or notes, or other instrument or instruments of writing, account or accounts, by which the said debtor is so indebted," &c.

In this case the plaintiffs do not produce the accounts themselves, but simply refer to them, as follows, viz:

1858,	June	10th,	To am't	as	per	act. stated...	$1,503 35
"	"	16th,	"	"	"	...	823 83
"	Aug.	21st,	"	"	"	...	812 85
"	Sept.	23d,	"	"	"	...	812 91
"	Oct.	5th,	"	"	"	...	593 60
							$4,546 54

And it is contended that this does not gratify the requirements of the law.

The plaintiffs admit by the statement that accounts had been stated between them and the defendants, and yet do not produce them. *Wood vs. Gault & Emory*, 2 *Md. Ch. Dec.*, 441. *Burke vs. Brown*, 2 *Atk.*, 399. *Story's Eq. Pl.*, *sec.* 798. *Barger vs. Collins*, 7 *H. & J.*, 218.

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Turner vs. Jenkins, 1 *H. & J.*, 163, 164. This defect renders the attachment a nullity, and it ought to be quashed. *Dawson vs. Brown*, 12 *G. & J.*, 53. *Garnees. of Wolf vs. Tinges*, 7 *Md. Rep.*, 215. *Lamden vs. Bowie*, 2 *Md. Rep.*, 334. And the garnishees could make the motion to quash at the time they did. 3. *Gill*, 320. A defect in the short note may be taken advantage of. 10 *G. & J.*, 386. 6 *G. & J.*, 348. 14 *Md. Rep.*, 565. *Graff vs. Gamble*, 18 *Md. Rep.*, 364. *Palmer & Hamilton vs. Oliver*, 11 *G. & J.*, 139, 140, 143.

2nd. They contend that the irregularity in the proceedings is fatal to the judgment sought to be enforced. The basis of the judgment against the garnishees is, first, the fact of a debt due by the defendants to the plaintiffs; and second, the fact of the garnishees having goods or credits in hand liable for that debt. These two facts must co-exist in reality or by construction of law to warrant a judgment against them. To establish the first of these essentials the original accounts, proved according to law, ought to be produced; and the non-production of them renders it impossible to extend any judgment against the defendants. And until a judgment is entered up against the defendants no proper judgment can be extended against the garnishees. The other essential to a proper judgment against the garnishees is proof of their having in hand funds or property of the defendants.

The only effect of a default is to warrant the Court to treat the plaintiffs' allegations as true, and to give judgment accordingly. But the proceedings nowhere show any allegation or averment against the garnishees, which by reason of their default may be taken *pro confesso*.

It is nowhere averred that they have sufficient funds in hand to pay the defendants' alleged indebtedness to the plaintiffs, nor is this want of averment anywhere supplied by proof.

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The right of the Court to adjudge the garnishees to have property in their hands only exists after interrogatories have been propounded to the garnishees, and they have failed to answer them. And as no interrogatories were put to the garnishees, the action of the Court is not in pursuance of the Act of Assembly to which the record refers, and is therefore erroneous.

The attachment law being in derogation of the common law, is to be construed strictly. And the Courts will not, by construction, add new provisions to it. *Brown vs. Somerville*, 8 *Md. Rep.*, 444. *Fitzhugh vs. Hellen*, 3 *H. & J.*, 206.

In support of what has been stated above in regard to the irregularity in the proceedings, and the defective form of the Sheriff's return, reference is made to the following authorities: 7 *Viner. Ab.*, 461, *Tit. Default, P.* 3. 3 *Bla. Com.*, 274. *Locke on Attachment*, (79 *Law Lib., p.* 60, 58.) 2 *Harr. Ent.*, 79, 80, 164, 215. *Boyd vs. Ches. and O. Canal Co.*, 17 *Md. Rep.*, 196. *Drake on Atta., sec.* 461. Act of 1715, ch. 40, sec. 4. *Turbill's Case*, 1 *Wms. Saund.*, 67, *n.* 1.

3d. But treating the judgment as final against the garnishees, and in other respects regular, it will be contended that it was obtained by fraud, deceit and surprise practiced upon them by the plaintiffs, and ought to be set aside. In support of this position see depositions of the garnishees' witnesses.

Many of the facts stated in these depositions are denied in the depositions filed on the part of the plaintiffs, and their truth or falsity are matter for argument.

If it appear from the depositions in this case that the judgment against the garnishees was obtained through "fraud, deceit, surprise or irregularity," the Court's authority to set it aside is recognized by the Act of 1787, ch. 9, sec. 6.

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Reverdy Johnson and P. McLaughlin for the appellees.

The first motion of the garnishees (February 27th, 1860,) alleges no grounds for the action of the Court, and, therefore, we pass it by without further notice.

We object to the motion of the 8th of March, 1860, because it does not set forth how or in what manner the garnishees were defrauded, deceived or surprised, or of what the irregularity complained of, consisted. If the motion of the 8th of March is sufficiently expressed, the case endeavored to be made by the affidavits filed in its support, would appear to raise the question as to whether the plaintiffs in obtaining the judgment committed fraud or deceit on the garnishees, or obtained it in a manner by which they could legally say they were surprised. The motion of the defendants of the 12th of March, 1860, goes merely to irregularity in not producing the account before the magistrate at the time of the filing of the affidavit.

The whole we think may be said to resolve themselves into two propositions:

I. Is the account produced and filed such an account as is contemplated by our attachment laws? *Acts of* 1795, —(*ch.* 56, *sec.* 1.) *Dawson vs. Brown*, 12 *G. & J.*, 53, 59. *Lee & Tinges*, 7 *Md. Rep.*, 215, 229. 2 *Greenleaf on Ev.* § 127, *and authorities there stated. Cowen's Treatise*, 478. 1 *Chit. on Pl.* 358. *Truman vs. Hurst*, 1 *Term.*, 40. *Highmore vs. Primrose*, 5 *Maule & Lebro*, 65. 1 *Saunders, Pl. & Ev.* 31, 32.

The judgment was entered regularly and in accordance with the practice of the Court. *Act of* 1715.—*ch.* 40, *sec.* 3, *Evans, Pr.* 99. *Sherwood vs. Mohler*, 14 *Md. Rep.*, 564. *Boyd vs. The Ches. & Ohio Canal Co.*, 17 *Md. Rep.*, 195, 211. *Walters & Harvey vs. Munroe*, 17 *Md. Rep.*, 501, 505.

Then as to the question of fraud and deceit. Is the evidence on this point sufficient to authorize the Court to disturb the judgment? The garnishees pretend that on

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three several occasions they have been deceived by the plaintiffs.

1st. On the day the attachment was laid.

2nd. In April, 1859, when Faust Freidenrich, as he says, called on Robert Moore to ascertain whether he would consent that the garnishee might be interrogated before a Justice of the Peace.

3rd. When in August, 1859, as Springer says, Robert Moore promised to abandon the suit if Moses H. Springer would testify in the case of *Moore et al. vs. Stadler et al.*

The counsel for the appellees referred to and commented upon the testimony on the part of the garnishees, and argued that there were no grounds upon which the judgment could be disturbed.

In Maryland it is laid down as a settled principle of law, that every person is bound to take care of, and protect and vindicate himself in due season and in proper place. *Gott vs. Carr*, 6 *G. & J.*, 309--312.

It is also a well settled general rule, that a recovery at law, will not be disturbed in Chancery, unless its justice can be impeached by facts, or on grounds, of which the party seeking the aid of Chancery could not have availed himself at law, or was prevented from doing it, by fraud, or accident, or the act of the opposite party, unmixed with any negligence, or fault of his own. *Gott vs. Carr*, 6 *G. & J.*, 309--312. *Creisch vs. McCauley*, 7 *Gill*, 189. *Wendwart vs. Allen*, 13 *Md. Rep.*, 196--200. 5 *How.* 141--142. *Kent vs. Richards*, 3 *Md. Ch. Dec.*, 392--307. *Keighler vs. Savage Man. Co.*, 12 *Md. Rep.*, 383--415. *Gardner vs. Jenkins*, 14 *Md. Rep.*, 58. *Fowler vs. Fowler*, 10 *G. & J.*, 358--362--364. 1 *Story's Eq., sec.* 105. 2 *Story's Eq., sec.* 887. *Marine In. Co. vs. Hogsdon*, 7 *Cranch.* 332.

A judgment it is said, is the highest exercise of judicial power, and as such, to be interfered with, or questioned only with great delicacy and circumspection, and were this

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not so, our judicature instead of being a guarantee of stability and certainty would be worse than a farce, would be a snare and a trap to the confiding. *Keighler vs. Savage Man. Co.*, 12 *Md. Rep.*, 383--415.

We submit that the evidence not only shows that the garnishees have the money of the defendants in their hands, but that they have it in such a way as would justify a Court of Equity in charging them, as trustees for the creditors, with the value of the coal oil factory.

1st. The garnishees are related by blood or by marriage. The garnishees Faust Freidenrich and Abraham Freidenrich are brothers, and are both brothers-in-law of Springer, the garnishee. Faust Freidenrich is father-in-law of the defendant, Fries, and Springer the defendant, is a brother of Springer, the garnishee. Evidence of relationship in such cases as this is greater evidence of confederation than of affection. *Sands et al. vs. Codwise*, 4 *Johns.*, 384. *Robinson vs. Moore*, 25 *Maine*, 192--198.

2nd. In 1857 the defendants were represented by the garnishees to be worth from $50,000 to $60,000 over their liabilities.

3rd. In a few months afterwards, the defendants declare themselves insolvent, owing $26,000; and the proceeds of the sales and collections, under the deed of trust, did not amount to $1,000.

4th. Faust Freidenrich, one of the garnishees, goes to see the defendants, promises to secure the debts of the plaintiffs, and on his return reports that he has secured the garnishees, but in reference to the plaintiffs, he said he could not attend to other persons' business.

We allege that the garnishees have aided the defendants to hinder, delay, or defraud their creditors; and, in doing so, have obtained possession or title to a large portion of the property of the defendants; and in support thereof, refer your Honors to the testimony.

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Upon a full view of the whole case, we submit that there is no ground, legal or equitable, which will authorize the Court to disturb the judgment, but on the contrary, when we consider all the equities which the plaintiffs have shown not only as against the defendants, but also as against the garnishees, we presume it would require much more than the conflicting evidence of the garnishees, to bring the Court to such a conclusion.

But we suppose the evidence sufficient to authorize the Court on a bill filed on the equity side of the Court by the creditors of the defendants, to decree that the garnishees should stand as trustees for the benefit of creditors of the defendants, as to the value of the coal oil factory.

Fraud will not be presumed, and though it may not be necessary to prove it by direct and positive testimony, yet the circumstances upon which the presumption of its existence is to be founded, should lead plainly and directly, and by strong implication, to that conclusion. *Duvall vs. Coale*, 1 *Md. Ch. Dec.*, 168–169. In questions of fraud, any fact, however slight, if at all relevant to the issue, will be admitted as evidence, though the circumstances when combined, must be so strong as to satisfy the jury of the fact to be established. *Waters vs. Dashiel*, 1 *Md. Rep.*, 474.

There is no ascertained rule of law which fixes and determines what acts or declarations of a party shall, in all cases, be required to establish fraud; but, on the contrary, the badges of fraud may and do vary according to the intellectual capacity and moral depravity of the perpetrator, the end designed to be obtained and the means by which it is to be accomplished. *Richards vs. Grome*, 7 *Gill*, 366–377. *Rollins vs. Moore*, 25 *Maine*, 192--198--200. *Parkham vs. Welsh*, 19 *Pick.*, 231--234.

In answer to the argument on the part of the appellants that the actual accounts required by the Act of 1795, ch. 56, to be produced before the officer, before whom the

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affidavit of indebtedness is made, were not produced but referred to only, and that the requirement of the law were not thereby gratified,—they argued: That an account stated may be proved by parol without written evidence of any kind; and that a balance agreed upon and reduced to writing by the plaintiff, is sufficient to maintain an action in an account stated and cited. 1 *Ch. Pl.* 358. 2 *Greenlf. on Ev.* § 127. *Ev. Md. Pr.*, 87. *Dawson vs. Brown,* 12 *G. & J.*, 53.

They further argued in answer to the appellants:—That the short note takes the place of a declaration. *Thrasher vs. Everhart,* 3 *G. & J.*, 234. *Smith vs. Gilmor,* 4 *H. & J.*, 177. And that the Act of 1795, ch. 56, allows a plaintiff, where the defendant does not appear to recover the amount of his demand from the garnishees to the value of the assets in his hands.

Bartol, J., delivered the opinion of this Court.

A writ of attachment or warrant was issued in this case, on the 22nd day of February, 1859, at the suit of Robert and Charles Moore, (the appellees,) for the purpose of recovering the sum of $4,546 54, alleged to be due them by L. H. Springer and Charles Fries, non-residents, the writ was on the same day "laid in the hands of the appellants trading in Baltimore under the name of Springer, Freidenrich & Co.," and was returnable to the ensuing May Term of the Superior Court. At that term the writ having been returned, and the garnishees not appearing, a judgment of condemnation *nisi* was entered against them on the 9th of May. No other proceedings were had until the 27th day of February, 1860, when Mr. Campbell appeared for the garnishees and filed a motion to strike out the judgment, but assigned no cause in support of the motion; afterwards, on the 8th day of March, 1860, the same motion was renewed on the part of the garnishees,

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asking that the judgment be stricken out and set aside, "for fraud and deceit, surprise and irregularity in obtaining the same." Accompanying this motion were the affidavits of Henry Bookman, Frederick Krager, Abraham Freidenrich and Moses H. Springer.

On the 10th day of March, 1860, motions were entered, one on behalf of the garnishees and the other on behalf of the defendants, "to quash the attachment because the accounts on which the defendants are alleged to be indebted to the plaintiffs, were not produced, and filed with the affidavit made by plaintiffs before the Justice who issued the warrant of attachment." On the 13th day of March the Court passed an order suspending execution upon the judgment till the further order of the Court, provided a bond should be filed by the garnishees as prescribed. The bond was filed accordingly. Thereafter a number of affidavits were filed on behalf of the garnishees, and of the plaintiffs, touching the alleged fraud and surprise in obtaining the judgment; and on the 16th day of June, 1862, the Superior Court overruled the motions to strike out the judgment, and to quash the attachment, from which decision this appeal was taken.

It appears from the record that the objections to the judgment rest upon two grounds:

1st. Fraud, deceit and surprise alleged to have been practiced by the appellees, in obtaining the same.

2nd. Irregularity in the judgment itself.

The first is to be determined by the testimony. This has been carefully examined, and the conclusion we have reached, on this branch of the case, is that the allegation of the appellants, in this respect, is not established by the evidence.

It conclusively appears that the attachment was served on the appellants at their store on the 22nd day of February, 1859. This fact is established by the Sheriff's return, and

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is corroborated by other proof. It appears that when the Sheriff went to serve the writ, the appellants, Faust Freidenrich and Moses H. Springer were at the store of the appellees, and their book-keeper, Bookman, went there to inform them of the Sheriff's visit. They were alarmed by the intelligence, and they state in their affidavits that Robert Moore informed them that it was an attachment he had laid in their hands against Springer & Fries, "but that it did not amount to anything," and Faust Freidenrich states that Moore further said to him that he (Moore) "only did it to effect a settlement." Robert Moore in his affidavit expressly contradicts this statement, and swears that what he said to them was "that they might not be so much alarmed about it, that there was time enough for them to attend to it, but that notwithstanding, they both left his store," and he states, "that it is not true that upon that or any other occasion he told them or either of them that the writ of attachment was of no consequence, or that he had caused the same to be issued to effect a settlement with Springer & Fries."

Faust Freidenrich further states in his affidavit that, in April, 1859, he asked Robert Moore if it was necessary to employ a lawyer, and that Moore told him that he did not want them to employ a lawyer in the case, that the attachment would not be pushed, and that all he wanted was, not to make the garnishees pay the money, but to effect a settlement through their influence with Springer & Fries." This statement stands on the testimony of Faust Freidenrich alone, and is positively contradicted by the affidavit of Robert Moore.

The witness, Frederick Krager, states that in August, 1859, Robert Moore asked Moses H. Springer to go before the Commissioner in Baltimore to testify in a suit of the appellee's against Springer & Fries, then being prosecuted in Cincinnati, which Springer at first declined to do; but

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Moore told him if he would go before the Commissioner and testify, the case here (that is this attachment case,) should be settled. Moses H. Springer states the same thing. As to this evidence, it may be remarked that it is contradicted by Robert Moore's testimony, and is inconsistent with the facts established by other proof showing that Springer was a reluctant and unwilling witness, at first refusing altogether to appear before the Commissioner, and when testifying, refusing to produce the books of account between his firm and Springer & Fries, called for during the examination, and employing counsel to resist the demand for the books. Besides the statement that in August, 1859, Robert Moore proposed to settle this attachment case on condition that Springer would testify before the Commissioner is inconsistent with the other statements that in February, when the writ was served, and in April, Moore had told them the attachment amounted to nothing, and would not be pushed. In the affidavits both of Krager and Springer, they state that Springer urged as his objection to going before the Commissioner that the case was being tried here, (in Baltimore) which shows that he knew this attachment suit had not been abandoned.

It is possible that the garnishees were ignorant of the necessity of appearing in Court and contesting the attachment. In one of the affidavits it is stated that they said, long afterwards, they thought there would be some advertisement on the subject in the newspapers, and in this way their failure to appear and defend sooner, if they intended to do so, may be susceptible of explanation. But that is not sufficient ground for striking out the judgment. To justify such a proceeding it is necessary that clear and convincing proof should be given that they were prevented from making their defense by deceit practiced upon them by the appellees; lulling them into the belief that the

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attachment had been or would be abandoned. The proof on this subject is not in our opinion sufficient to warrant the Court in so declaring. There is much conflict in the statements of the parties which it is impossible to reconcile; nor do we deem it necessary to discuss in this opinion all the testimony in the cause. We have stated our conclusion from the whole evidence.

It must not be lost sight of that the process was regularly served upon the garnishees by the Sheriff; at the return of the writ, the judgment complained of was entered in open Court, and stood upon the public records as notice to them that unless they appeared and made defence during the term, the judgment would become absolute. If they were ignorant of the law and for that reason failed to appear, it is their misfortune, from the consequences of which this Court cannot relieve them. To strike out a solemn judgment on such grounds would be establishing a principle most dangerous in its consequences and having no precedent to support it. See *Peters vs. League*, 13 *Md. Rep.*, 58, *and Windwart vs. Allen*, *Ibid*, 196.

The other ground for the motion is the alleged irregularity in entering the judgment of condemnation. This is supposed to consist in the failure to produce before the Justice, who issued the warrant, such an account as was required by the Act of 1795, ch. 56, and its supplements.

An account was produced, which if it were material to pass upon the question, we are inclined to think would be held to be a sufficient account under the Act of Assembly even if the objection had been made in time. See *Dawson vs. Brown*, 12 *G. & J.*, 53, 59. *Lee & Brewster vs. Tinges*, 7 *Md. Rep.*, 215, 229. Upon that question, however, it is not material for us to express any conclusive opinion, because even if the account produced were obnoxious to the objection urged by the appellants, the objection was not

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made in time. *Sherwood vs. Mohler*, 14 *Md. Rep.*, 564. See, also, 13 *Md. Rep.*, 196. 17 *Md. Rep.*, 195. *Id.*, 501. This would not be such an irregularity as existed in *Graff vs. Gambrill*, 18 *Md. Rep.*, 364, where the judgment of condemnation was entered before the return of the writ.

Other supposed irregularities in the judgment were suggested by the appellants in their argument in this Court. These it was contended consisted in the defective service and return of the writ by the Sheriff; and in the entry of the judgment against the garnishees without any judicial ascertainment of the fact that they had in their hands goods, chattels and credits of the defendants to the amount of the plaintiffs' claim or to any amount. The return of the Sheriff was that he had laid the attachment in the hands of the garnishees, &c., without stating to what amount. But such a return is sufficient; the garnishees were informed by the service of the writ, what was the amount of the plaintiffs' demand, and it is not usual or necessary for the Sheriff to state in his return for what amount he has laid the attachment in the garnishees' hands, although that form has sometimes been observed.

A failure of the garnishees to appear entitled the plaintiffs to the judgment *nisi*, which in such case is a motion of course, and no inquisition is necessary. *Evans' Practice*, 87, 99. 13 *Md. Rep.*, 58, *Id.*, 196. 14 *Md. Rep.*, 564. 17 *Md. Rep.*, 195, *Id.*, 501.

A reference to these authorities will show that the judgment was entered regularly in accordance with the practice. The judgment of the Superior Court on the motions will therefore be affirmed.

Judgment affirmed.

(Decided March 22nd, 1866.)

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STATE OF MARYLAND, USE OF MARGARET ANN MURRAY, FOR HERSELF, AND AS GUARDIAN OF WILLIAM AND ALICE ANNE MURRAY, *vs.* RICHARD BISHOP AND RICHARD C. MURRAY.

GUARDIAN AND WARD: GUARDIAN'S BOND, ACTION ON.—Where a guardian illegally sells and transfers the property of the ward contrary to the Act of Assembly, without a previous order of the Orphans' Court, and converts the proceeds to his own use, it is no answer to an action on the bond by the ward, that under the Act of Assembly the sale itself is void and passed no title to the purchasers.

——: ——: DAMAGES, MEASURE OF.—In such case it is clear that the action could not be maintained, and if nothing else appeared the measure of damages would be the value of the property illegally converted.

——: ——: CUMULATIVE REMEDY.—Where the property thus sold and transferred was the stock of an incorporated company, the ward is not confined to his action on the bond, but has the cumulative remedy against the corporation, may repudiate the sale as void and recover the stock thus illegally transferred.

——: ——: DAMAGES, MEASURE OF.—But where the ward has recovered from such incorporated company the value of the shares of stock illegally transferred by the guardian, in the action upon the guardian's bond, the measure of the damages is the loss actually suffered from the breach of the condition of the bond.

And where the sale of the stock was held void under the Act of 1843, and it or its value has been actually restored by the corporation, though this fact does not defeat the action on the bond, it reduces the right of the plaintiff to the recovery of nominal damages only.

THE ENTRY OF THE SUIT FOR THE USE OF THE CORPORATION, GIVES IT NO RIGHT OF ACTION ON THE GUARDIAN'S BOND.—Where, under the facts above stated, the suit is entered to the use of the corporation, and actually prosecuted for its benefit, after the restoration of the stock or its value, though entitled its action against the guardian to recover back the price paid him for the stock, it has no right of action on the guardian's bond.

APPEAL from the Superior Court of Baltimore City.

This case was argued in the Superior Court of Baltimore City upon the following agreed statement of facts:

"It is admitted in this case that the said Richard C. Murray was duly appointed by the Orphans' Court for Baltimore City the guardian of his infant children, Mar-

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garet A. Murray, William E. Murray and Alice Anne Murray, and that after his appointment he gave bond for the faithful performance of his duties as guardian, which was duly approved by the said Court, a copy whereof is herewith filed, marked No. 1, as part of this statement.

"That the sureties in the said bond, who duly executed the same, were Edward Dowling and Edward Boyle, (both of whom died insolvent before the institution of this action,) and Richard Bishop, one of the defendants in the present case.

"That subsequently to the appointment of the said Rich'd C. Murray, as guardian, there stood upon the books of the President and Managers of the Baltimore and Fredericktown Turnpike Road Company one hundred and eighty-three shares of the capital stock of said company, the property of said infants, of which sixty-one shares stood in the name of the said Margaret A. Murray, sixty-one in the name of the said William E. Murray, and the remaining sixty-one in the name of the said Alice Anne Murray, all of which stock was transferred to the said infants (upon the books of the said company) by a certain Charles Feinour, on the eighteenth day of October, 1855. That the said infants had in like manner standing in their names upon the books of the Union Manufacturing Company twelve shares of its capital stock, which belonged to them in equal several parts or number of shares. That the said Richard C. Murray, guardian as aforesaid, did, on the eleventh day of December, 1857, sell all of the said one hundred and eighty-three shares of the capital stock of the said Turnpike Road Company, and did afterwards cause the same to be transferred upon the books for said company to the purchasers or purchaser thereof, and that at the time of the consummation of the sale as above mentioned, he did receive, as the purchase money for the said stock, the sum of five hundred and four-

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teen dollars and sixty-eight cents. That the said Murray also sold and caused to be transferred upon the books of the corporation, the twelve shares of the capital stock of the aforesaid Union Manufacturing Company, being the property, as before stated, of the said infants, and did receive therefor, upon the twenty-eighth day of December, 1857, the sum of one hundred and fifty-six dollars. All the aforementioned sales were effected by the said Murray without any order of the Orphans' Court authorizing the same, nor did he render any account whatever as guardian to said Court, although frequently cited so to do, but converted and applied the same to his own use.

"That on proper application being made to the Orphans' Court the letters of guardianship, which had been granted to the said Richard C. Murray, were revoked on the twenty-fifth day of January, 1859, and Margaret A. Murray, originally one of his wards, but having subsequently arrived at the age of twenty-one years, was appointed by the said Court guardian of her infant brother and sister, the said William E. and Alice Anne Murray, in the place of her father, the said Richard C. Murray; upon the same date the usual bond was duly executed and delivered by the new guardian, and approved by the Court. That after the appointment of the said Margaret as guardian, the said Richard C. Murray was cited before the Orphans' Court to account for his management of his wards' estate, but that he never rendered any account of any kind or description whatsoever, nor did he, while guardian, pay over any part of the money received by him for the stocks sold as aforesaid to either of said wards, or on their or either of their accounts, nor has he done so since his removal. That the said Margaret A. Murray, for herself, and as guardian of her sister and brother, applied to the said Turnpike and Manufacturing Companies, respectively, for the value of the stock which had

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been transferred upon their books to the purchasers to whom they were sold by the said Richard C. Murray, together with the interest thereupon up to the date of the demand; but that the said companies refused to pay the money thus demanded of them, except upon the condition that the said Margaret should first cause suit to be instituted upon the guardian's bond of the said Richard C. Murray in the ordinary manner, and assign the claim in the said suit to them respectively, according to the value of the shares of their respective stocks sold as aforesaid by the said Murray. That these terms were agreed to by the said guardian, and this suit was accordingly instituted, and the said claims against the guardian's bond transferred to the said Baltimore and Fredericktown Turnpike Road Company, and a certain Daniel B. Banks, President of the said Union Manufacturing Company, (he having been the purchaser of the twelve shares of manufacturing stock sold as above mentioned by said Murray, and having individually paid the amount mentioned in the assignment to him,) by assignments of the ninth and eighteenth of May, 1860, which said assignments are to be taken as a part of this statement, and are herewith filed, marked Nos. 2 and 3.

"Whereupon the said companies respectively paid to the said Margaret the value of the said shares, (as mentioned in the said assignments,) which had stood upon their books in the names of the said Margaret and the said infants, respectively.

"That the bringing of said suit and the assignments of the claims as above stated, and the authority to enter said uses to the said Turnpike Company and Daniel B. Banks, were all confirmed by and derived from the said Orphans' Court by an order of the twenty-seventh of June, 1860, and will more fully appear by the petition of the said Margaret Murray and the said order of the Court

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thereupon passed; herewith filed, marked respectively Nos. 4 and 5, and which are to be taken as part of this statement, subject to their legal operation in the judgment of this Court, and to all questions as to the jurisdiction of the Orphans' Court in the premises.

"It is further agreed that if, in the opinion of the Court, the plaintiff shall be entitled to recover upon the foregoing statement of facts other than nominal damages, then judgment in proper form shall be given for the sum of five hundred and fourteen dollars and sixty-eight cents, with interest from the eleventh day of September, 1857, and for the further sum of one hundred and fifty-six dollars, with interest from the twenty-eighth day of December, 1857, with costs, otherwise judgment shall be rendered for the defendants with costs.

"It is also agreed that an appeal may be taken by either party from the judgment of said Court to the Court of Appeals of Maryland, which shall have power to hear and determine the same, and further that inferences of fact may be drawn by either Court from the facts stated."

Exhibits Nos. 1, 2, 3, 4 and 5, forming part of the said argument, were as follows:

(No. 1.)

This exhibit was a duly certified copy of the guardian's bonds.

(No. 2.)

"BALTIMORE, 9th May, 1860.

"Received from the President, Managers and Company of the Baltimore and Fredericktown Turnpike Road, the sum of five hundred and eighty-nine dollars and nine cents, ($589.09,) and in consideration whereof, the undersigned do hereby transfer their claim against Richard C. Murray and his surety, Richard Bishop, to the said Company, and for which said claim suit has been brought against said

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Richard C. Murray and Bishop, in the Superior Court of Baltimore City, and an order given to have the same entered to the use of said Company; this transfer being limited to the sale of the stock of said Company improperly made.

Signed, MARGARET MURRAY, for herself,
and Guardian of W. E. and Alice Anne
Murray, by T. Parkin Scott, Att'y."

(No. 3.)

"For value received, I assign unto Daniel B. Banks the claim of myself and my two wards, Alice and William Murray, against Richard C. Murray and his securities, for the value of twelve shares of the capital stock of the Union Manufacturing Company of Maryland, illegally sold and transferred by said R. C. Murray, viz:

12 shares sold, a $13	$156 00
Interest 2 yrs. 4 mos. 18 days	22 31
Baltimore, 18th May, 1860.	$178 31

T. PARKIN SCOTT, Att'y for Margaret A.
Murray, in her own right, and as guar-
dian of Alice and William E. Murray."

(No. 4.)

"*To the Honorable the Judges of the*
Orphans' Court of Baltimore City:

"The petition of Margaret A. Murray, guardian of Wm. Murray and Alice Murray, her minor brother and sister, respectfully states to your Honors, that the former guardian of your petitioner and of said minors, Richard C. Murray caused to be sold and transferred one hundred and eighty-three shares of the capital stock of the President and Managers and Company of the Baltimore and Fredericktown Turnpike Road, on the 11th day of December, A. D. 1857,

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being the property of his said wards, and received therefor, on the day and year last aforesaid, the sum of five hundred and fourteen dollars and sixty-eight cents. And the said Richard C. Murray did also, on the 24th day of December, A. D. 1857, sell and cause to be transferred twelve shares of the capital stock of the Union Manufacturing Company of Maryland, and being the property of his said wards, for the sum of one hundred and fifty-six dollars; that the said Richard C. Murray, former guardian, received the aforesaid sums of money, which he has not paid, nor any part thereof, to your petitioner or either of said wards, nor rendered any account to your petitioner or to this honorable Court.

"Wherefore your petitioner caused suit to be instituted upon the bond of the said former guardian against him and his security, Richard Bishop, the other securities on said bond, Edw'd Boyle and Edw'd Dowling, having departed this life, to recover the proceeds of the sales of said stocks. That since the institution of said suit, your petitioner has assigned a part of her claim therein, to the amount of five hundred and fourteen dollars and sixty-eight cents, to the said Turnpike Company, and has given an order to have the same to said amount entered to the use of said Company.

"That your petitioner has also assigned the other part of her claim in said suit, to the amount of one hundred and fifty-six dollars, to a certain Daniel B. Banks, of the city of Baltimore, and has also given an order to have the said suit, to the amount last aforesaid, entered to the use of the said Banks. That your petitioner received full value for both said claims.

"Wherefore your petitioner prays that the institution of said suit, and the assignment of said claims and entries to the several uses as hereinbefore stated, may be sanctioned and ratified by the order of this honorable Court.

T. Parkin Scott, Sol. and Att'y
for Petitioner and the Wards."

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(No. 5.)

"In Baltimore City Orphans' Court, June 27, 1860. On application by the petition of Margaret A. Murray, guardian of William Murray and Alice Murray, her minor brother and sister, filed the 23d day of June, 1860, it is ordered by the Court that the institution of the suit mentioned in the said petition, and other assignments of the claims therein stated to a certain Turnpike Company and Daniel B. Banks, and the order to enter said suit to the several uses to the amounts respectively mentioned to the said company and Daniel B. Banks, be and the same are hereby approved, ratified and confirmed.

J. SPEAR SMITH,
JOS. H. AUDOUN,
FRANKLIN SUPPLEE."

These exhibits were all duly certified.

The case being submitted upon the aforegoing agreement and exhibits, the Court below (MARTIN, J.) entered a judgment of *non pros.* with costs, &c., to the defendants, as per the said agreement. The plaintiffs appealed.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

H. R. Dulany for the appellants.

The appellants, who were the plaintiffs below, contend:

1st. That although the nature and extent of the obligations of the sureties to a bond depend altogether upon the terms of the instrument itself, and their liability cannot be increased nor in any way affected by resort to implication, yet that they are responsible to the full extent which the terms of the instrument, or the character of the act for which they have obliged themselves, will warrant. *Strawbridge et al. vs. The Balto. and Ohio R. R. Co.*, 14 *Md. Rep.*, 360, 366, 367. *Conant vs. Kendall*, 21 *Pick.*, 36. *Cole vs. Eaton*, 8 *Cushing*, 587.

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2d. That the sale of the stocks, without an order of the Orphans' Court authorizing the same, and the conversion of the proceeds thereof to his own use by Richard C. Murray, constituted two distinct breaches of the condition of his guardian's bond, and rendered it obnoxious to the present action. *Act* 1843, *ch.* 304, *sec.* 1.

3d. The fact that the new guardian had power to sue the Turnpike and Manufacturing Companies, for permitting the transfer of the stock upon their books to the purchasers, without an order of the Orphans' Court, as required by law, (Act 1843, ch. 306, sec. 1, *The Mayor and City Council of Balto. vs. Wm. B. Norman*, 4 *Md. Rep.*, 352,) or that it was made her duty, by the second section of the above mentioned act, to pursue the stock when sold, and recover possession thereof, does not in any degree impair the common law remedy against the bond. All the remedies are cumulative and coexist; the object of the legislature being to guard in every possible way the property of infants from injury or destruction, by the unauthorized acts of their guardians. *The Mayor and City Council of Balto. vs. Howard*, 6 *H. & J.*, 383. *Farmers' Turnpike Road vs. Coventry*, 10 *John.*, 388. *Chilton vs. Parks et al.*, 15 *Ala.*, 674. *Withers vs. Hickman*, 6 *B. Monroe*, 292.

4th. Assuming, then, that the action against the sureties was warranted by the breaches of the condition of the bond before noticed, the appellants will next contend that the assignments, by Margaret Murray, the new guardian, to the Company of the Baltimore and Fredericktown Turnpike Road, and Daniel B. Banks, made, respectively, upon the ninth and eighteenth days of May, 1860, and ratified and approved by an order of the Orphans' Court for Baltimore City, of the 27th June, 1860, were valid and effective instruments, and that they operated to transfer to the assignees all the rights possessed by the assignor, or her wards, against the bond of Richard C. Murray, the old

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guardian. *Commonwealth vs. Barstow et al.*, 3. *B. Monroe*, 290, *p.* 293. *Kiersted vs. The State use of Costello*, 1 *G. & J.*, *p.* 231. 1 *Code*, *Art.* 9, *sec.* 1.

5th. It cannot be argued that the assignees are not entitled to the benefit of the action instituted against the bond, on the ground that, by transferring the stock upon their books without an order of the Orphans' Court, they conduced in some degree to the loss, or enabled the guardian to perpetrate the wrong upon his wards; because, in the first place, it is clear that the provision violated by the companies was enacted only for the benefit and protection of the infants. Evidently, therefore, it cannot be invoked by the sureties.

But, further, it is denied that such transfer did conduce in any way to the loss. The real injury to the infants was the misapplication, by Murray, of the proceeds of the sales of stock affected by him. But it is beyond doubt, that he could have made this misapplication whether the transfer had been in all respects legitimate or not.

Lastly, however, it will be contended that, even admitting that the sureties may take advantage of the enactment in question, and that the conduct of the companies did, in some degree, conduce to the loss, the assignees will not therefore be deprived of any rights which they would otherwise have had under the said assignments, for it has been settled that a party may, to a certain extent, be the author of a loss, and still suffer no disability thereby, provided he was not the efficient cause thereof. *Deering vs. Earl of Winchelsea*, 1 *Cox, Chan. Cases, p.* 318. *Fell on Guarantees*, *p.* 242, *Ed.* 1859.

The appellants rely particularly upon *Whiting use of the Sun Mutual Insurance Co. vs. The Independent Mutual Insurance Co.*, 15 *Md. Rep.*, 297, a case which was not cited by counsel, or referred to by the Court, in the trial below.

No counsel for the appellees appeared at the hearing.

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BARTOL, J., delivered the opinion of the Court.

We entertain no doubt whatever that the breaches alleged in the amended nar. are within the conditions of the bond sued on, and that the fourth plea of the defendants would be no defence to the action, but would be bad on demurrer. The object of the guardian bond is to secure the ward against the illegal disposition of his property by the guardian, or its maladministration; and where a guardian illegally sells and transfers the property of the ward contrary to the Act of Assembly, without a previous order of the Orphans' Court, and converts the proceeds to his own use, it is no answer to an action on the bond by the ward; that under the Act of Assembly the sale itself is void, and passed no title to the purchaser. In such case it is clear that the action could be maintained; and if nothing else appeared the measure of damages would be the value of the property illegally converted.

The case before us however is not presented in this form, it arises upon an agreed statement facts, (*ante pp.* 310 *to* 317,) and the only question presented is, what is the true measure of damages upon the facts stated.

In the case of the *Mayor and City Council of Baltimore, vs. Norman*, 4 *Md. Rep.*, 352, it was decided that a transfer of stock standing in the name of a ward, made by a guardian without the order of the Orphans' Court, was under the Act of 1843, ch. 304, void, and the rights of the ward were not affected by it.

It thus appears that in a case like this, the ward is not confined to his action upon the bond; but has the cumulative remedy against the corporation, may repudiate the sale as void, and recover the stock thus illegally transferred. See also *Chew & Goldsborough vs. The Bank of Baltimore*, 14 *Md. Rep.*, 300.

In this case it appears from the facts stated that the

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cestuis que use have recovered from the Fredericktown Turnpike Road Company, and the Union Manufacturing Company, the value of the shares of stock in those companies respectively, which had been illegally transferred by their guardian, and the question is whether that fact reduces the measure of damages in this action, or whether they are entitled to recover in this suit the same amount as if the stock had been lost to them and they had received no indemnity or compensation whatever from the companies. The mere statement of this question, it seems to us, carries with it its own solution. No authority need be cited to establish the familiar proposition, that where a party has cumulative remedies against one person or several persons to recover compensation for a tort, he cannot after he has recovered compensation in one form of action recover from the same person indemnity for the same wrong in another form of action; nor, if the remedy be against several, and compensation be recovered from one, can damages for the same cause of action be afterwards recovered against the others. The measure of damages in this suit is the loss actually suffered by the *cestuis que use*, from the breach of the condition of the bond committed by the guardian, and if the sale of their stock was void under the Act of 1843, and they have in fact had it or its value restored to them, by the companies, then, though this fact does not defeat this action, it reduces the right of the plaintiff to recover nominal damages only, and according to the agreement in the case, a judgment for the defendants was properly entered.

It appears from the statement of facts, that the two companies made it a condition precedent to their restoring the stock or its value, that this suit on the bond should be instituted, and in conformity with that requirement this suit was brought, and is entered for their use and really prosecuted for their benefit. The appellants have relied

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upon this fact as material in the decision of the case, and have argued that it falls within the principle decided in *Merryman vs. State, at the instance of Harris, use of Murray*, 5 *H. & J.*, 423, and *Whiting, use of Sun Mutual Ins. Co. vs. Independent Mutual Ins. Co.*, 15 *Md. Rep.*, 297.

But the distinction between those cases and this is very obvious; in them it was held that a defendant could not claim exemption from liability for his own debt or on his own contract, or reduce the amount of the plaintiff's recovery, on the ground that some other person who was a stranger to him and not liable to the plaintiff for the same debt, or in respect of the same cause of action, had under a mistake of facts or of law, paid and indemnified the plaintiff. In such case the payment does not inure to the benefit of the defendant, and this for obvious reasons. If the payment were made under a mistake of fact, the plaintiff would be liable in an action by the party from whom he had received, and if paid under a mistake of law, although he could not be compelled by an action to pay it back, yet in good conscience he ought to do so, and in neither case could the defendant, who is a stranger to the transaction, claim that the plaintiff should retain the sum so received by him from others, so that he (the defendant) may be exempt from liability upon his own contract to which they are strangers.

Here the companies were not strangers to the transaction upon which the plaintiff's right of action arose, the illegal transfer of their stock; on the contrary they were in contemplation of law, *tort fesors*, equally with Richard C. Murray, the guardian, and were alike responsible to the wards for the stock or its value. They might be entitled to their action against Richard C. Murray, to recover back the price paid him for the stock, but they have no right of action on the guardians' bond, and cannot therefore legally

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claim that in this suit a larger sum should be recovered than if the case had not been entered for their use.

This Court being of opinion that upon the facts stated, the original *cestuis que use* are entitled to recover no more than nominal damages, the judgment appealed from will be affirmed.

Judgment affirmed.

(Decided March 22nd, 1866.)

JOHN TARTAR, JAMES PECK, DAVID P. JONES AND OTHERS, TRUSTEES OF THE AFRICAN M. E. CHURCH OF THE CITY OF BALTIMORE *vs.* HENRY GIBBS, PERRY SHEAF, AND OTHERS.

INCORPORATION OF CHRISTIAN SOCIETIES OR CONGREGATIONS UNDER ACT OF 1802 ch. III.—Where a Christian society or congregation incorporates itself under the Act of 1802, ch. III, the persons elected under the articles of incorporation, constitute a body politic, and as such act as trustees holding the estate in perpetual succession, and to manage the same in the most upright and careful manner, according to the discipline of the Church with which they are connected.

The male members of the Chnrch are invested with no visitorial or controlling power over the minister or trustees, or interest in the property of the corporation, or with any authority except in the case of selling or leasing, or in amending the articles, when the consent of two-thirds is required.

CORPORATIONS, HOW TO BE SUED.—The corporation so formed can only be sued in its corporate name; and a suit against the trustees individually, designating them as trustees of the corporation, omitting part of the corporate name is not a suit against the corporate body, the designation superadded being merely a "*descriptio personæ.*"

Where the legal capacities of persons are different, such capacities must be considered as if they were several persons.

MULTIFARIOUSNESS—PRACTICE IN EQUITY.—A Court of Equity may *sua sponte* dismiss a bill for multifariousness when deemed necessary to the proper administration of justice.

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——:——: PLEADINGS IN EQUITY.—The general rule is, that if the infirmity of the plaintiff's case appears upon the face of the bill, the defendant may rely upon it at the hearing, no matter how imperfect or what the character of the answer, and that it is only with respect to some defences given by statute, that a different rule prevails.

PRACTICE AND PLEADINGS IN EQUITY.—An objection to the jurisdiction of the Court, or to the capacity of the plaintiffs, may be presented at any time. It may be made by demurrer, plea, answer, or taken advantage of at the hearing.

DIVINE WORSHIP: CHURCH MUSIC.—Singing is recognized as a part of Divine worship among almost all denominations of Christians. Whether it should or should not be accompanied with instrumental music, must be determined by those who administer the discipline of the Church to which they belong.

INTRUSION: MANDAMUS: INJUNCTION.—If the trustees of a church have intruded upon the office or duties of the minister or stewards of the Church, it is no ground for interposition by injunction at the instance of the male members of the congregation, but the remedy is by mandamus at the relation of the officer disturbed or ousted.

APPEAL from the Circuit Court of Baltimore City.

The facts of this case are fully stated in the opinion of this Court.

The cause was argued before BOWIE, C. J., BARTOL, COCHRAN and WEISEL, J.

Wm. S. Waters and William Daniel for the appellants.

First. Independent of the question of parties and all other questions, there are no facts alleged which, if true, could authorize the injunction, or making it perpetual. Relief can only be granted upon allegations, and these allegations cannot be extended by evidence. If they are insufficient, no relief can be granted.

Nothing is alleged, either in the original or amended bill, except that instrumental music had been introduced into the worship of the Church, without the legal assent of those entitled to control the matter, contrary to the provisions of the charter, and that, in what the trustees

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are charged with doing, they departed from the provisions of the charter, and that, forasmuch as they had violated the charter, relief was asked. That the facts alleged are a violation of the Act of incorporation, and that there are such provisions in it as are alleged, is denied by the Act of incorporation itself, filed as part of the bill, and entitled to be considered as part of the allegations thereof.

Second. The complainants do not allege any interest in the subject matter of the bill. They describe themselves in the bill as "male members of the African Methodist Episcopal Church of the City of Baltimore," and as such they sue in respect to the breaches of the Act of incorporation. This Act of incorporation purports to have been formed by a more restricted body of men. "The male members of the African Methodist Episcopal Church, above the age of twenty-one years, and residing within the City of Baltimore, and attached to the congregations or churches commonly called, and known by the name of the Sharp Street and Asbury Church." There is no averment in the bill from which it may be inferred that these complainants, or any of them have any interest in the Act of incorporation, or are in any way connected with the subject matter of dispute, even as male members, to be consulted on the exigencies when male members are to be consulted by the terms of the Act of incorporation. For aught that appears they are mere volunteers. *Hill on Trustees*, 519, 458, 459. 2 *Kent*, 304. *Gibbs vs. Cunningham*, 4 *Md. Ch. Dec.*, 322. *Dolan vs. Foy*, 4 *Gill*, 395. *Story Eq. Pl.*, 26, 23, 28. *Balt. U. F. Dep. vs. Creamer*, 17 *Md. Rep.*, 258.

Third. The male members who formed the Act of incorporation, and are on occasion named in it to be consulted, are not a part of the body corporate, or corporation in any sense. The trustees are the body corporate, and the male

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members have no control over the duties of the corporation. *African Church vs. Cormac*, 2 *Md. Ch. Dec.*, 143.

Fourth. The complainants do not sue for themselves and all others having a like interest, nor is there anything alleged in the bill from which it may be inferred that any one has an interest in the suit but themselves, and although it is stated that a majority is opposed to the acts of the trustees in the matter of the music, yet it does not appear that they are in favor of the remedy pursued by the complainants, and in their testimony many of them disclaim it. It is necessary that all parties in interest should be parties in some sense. If too numerous, they appear by representation. Here the complainants do not profess to be the representatives of any one but themselves. *Smith vs. Swormstreet*, 16 *How.*, 288. *Story Eq. Pl.*, *secs.* 72, 107, 108, 109, 110, 113, 131 *and* 117. *Note* 114. 2 *Mad. Ch. Pr.* 174–177. *Lloyd vs. Loring*, 6 *Ves.*. 77, 3 *Note.*

Fifth. It is stated in the opinion of the Court that the bill was agreed to be amended so as to make the complainants sue for themselves and as next friends of the *cestui que trusts* named in the deed of John Sinclair to Jacob Gaillard. Whilst it was conceded that it was competent for the Court to make such amendment, yet it was never agreed in fact that it should be considered as made. This mode of describing the complainants appears alone in the titling of the case in the final decree. But conceding that it was made, it shows that the complainants in express words, so far as the music is concerned, claim to act for themselves and represent no one.

Sixth. The respondents are described as "Trustees of the African Methodist Episcopal Church." Their corporate name is "Trustees of the African Methodist Episcopal Church of the City of Baltimore," and by that name they must sue and be sued. They are, however, sued

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as individuals, and the Court is asked to deal with them as individuals, and not as a body corporate. The body corporate alone is responsible for breaches of corporation duty, and are to be compelled to perform corporate duties. *Ang. & Ames on Cor., page* 462, *secs.* 391, 392, 393–777. *Smith vs. Howard*, 12 *Md. Rep.*, 372. *Clayton vs. Carey*, 4 *Md. Rep.*, 26. *People vs. Steel*, 2 *Barb., S. C.*, 417. *Colman vs. R. R. Co.*, 10 *Beav.*, 11. *Bagshaw vs. E. N. R. Co.*, 7 *Hare*, 130.

1. It is charged that the trustees have failed in providing a school for the admission of the poor colored children referred to in the deed, thereby rendering the title insecure. This allegation the trustees deny, and allege that they have provided a school, &c. The evidence, if admissible under the issue, does not contradict, but sustains the denial.

2. It is alleged that the rents and profits have not been applied as required by the deed of trust, but have been used and appropriated by the trustees for other purposes not authorized, or contemplated by the grantor. The denial of this allegation is covered by the general denial in the answer. This allegation is too general, and is not sufficiently specific or certain for any relief according to the rules of equity pleading.

3. The decree referring to the auditor is not within the prayer of the bill. The prayer is that the trustees may be called upon to render an account of their receipts and disbursements for the last three years. This is not a prayer for an account. It is answered when the account is rendered, as has been done. The decree for an account is not been limited to three years.

4. The fact that there is a prayer for the removal of the trustees, and that this account is as necessary in going to

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determine the action of the Court upon this point, will not aid the decree for an account. The trustees are a body corporate, and the connection with this trust is incidental. If they commit such breaches of trust as will induce the appointment of new trustees of this particular fund, that will not induce the Court to deprive them of their corporate rights under the Act of incorporation, which is a different matter. They are trustees of this trust in their corporate and not in their individual character, and can be sued in reference to it only in the corporate capacity, can be remedied only as a corporate body. And the misconduct could, at most, only involve the removal of them from the particular trust. The prayer is, that the trustee account generally, and that they be removed generally.

5. The appellees are not alleged in the bill to have any interest in the subject matter of the trust at all. They are described in the original bill as members of the African Methodist Episcopal Church in the City of Baltimore, and in the alleged amendment heretofore referred to as next friends of the *cestui que trust*, and in this deed of trust. Granting the amendment regularly, (and this is not granted,) this description is not a sufficient averment of title to authorize them to interfere in this trust, or the Court to decree anything in their favor.

6. There are the same objections to them being considered proper parties as have been considered in reference to the question of music, with this exception, that this is a trust and is a charity which this Court cannot enforce in the manner proposed by the bill of complaint, and the decree at the suit of these appellees.

7. The testimony shows no misapplication of the trust fund. The answer denies it. The account filed with the answer being a paper called for on oath, is evidence of its contents.

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The quarterly conference, whose duty it was, according to the discipline of the Church, to examine the accounts of the trustees, examined them and approved them.

In reference to all the subjects, it will be observed, that the bill is multifarious. Three of four distinct subjects are embraced in it, having no connection with each other.*

Benjamin C. Presstman for the appellees.

The appellees will seek to maintain, that the allegations of the bill are amply sustained by the proof in the cause, and that the case is one of equity cognizance.

Act of 1802, ch. 111, secs. 2, 3, 4, 5, 6, 7, 12. Act of 1809, ch. 139. *Articles of Incorporation of the African Methodist Episcopal Church. Discipline of the Methodist Episcopal Church, chap.* 3, *sec.* 1, *page* 41, "*Public Worship.*" "*The Spirit and Truth of Singing,*" *sec.* 2, *page* 42. The trustees were clothed with full power to regulate the management and use of property. No change is to be made by them affecting the economy of the Church, nor in the current receipts and disbursement of the funds of the Church. Act of incorporation, section 7. No change to be made in the provisions of these articles, except by a vote of two-thirds of the male members over twenty-one years, at a meeting called for that purpose. For the true meaning of the word economy as used in the articles see said articles.

The question as to the use and employment of a musical instrument in the divine service of the African Methodist Episcopal Church, was submitted, after due notice, by the minister in charge (Rev. Mr. Cronin,) to a meeting of the male members of the Church, called according to the charter of the corporation, at which he presided, and was, as is proved by the minutes, duly attested, decided by the

*Note by Reporter.—A large portion of the argument of the appellants being on points not passed upon by the Court, has been omitted.

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majority of the said meeting that the musical instrument should not be so used and employed. And the appellees have the right to invoke the aid of the Court, as possessing alone the power to carry into effect that decision. *Daniels Ch. Pl. Story's Eq. Pleading.*

Trustees have no right to alter the terms of the trust. *Dolan & Foy vs. the Mayor and City Council of Baltimore,* 4 *Gill,* 395. All male members over the age of twenty-one years are *cestui que trusts.* 2 *Story's Equity, Jurisprudence. Title Trusts, secs.* 960, 961, 963. *Lingan vs. Henderson,* 1 *Bland,* 326. 2 *Greenleaf,* 248. *Campbell vs. Poultney,* 6 *G. & J. Tiernan vs. Poor,* 1 *G. & J.,* 216. The proper parties have been made to the bill. *Act* 1802, *ch.* 111, *sec.* 1. *Daniel's Ch. P., page* 25, *sec.* 5. *Story's Eq. Pleadings,* 50. 5 *H. & J.,* 122.

The answer of defendants admits that they hold in trust the property conveyed by Sinclair to Gaillard. *McCormick vs. Gibson,* 3 *G. & J.,* 12. *McCubbin vs. Cromwell,* 7 *G. & J.,* 157. No exception can be taken to the bill for multifariousness.

"Where a party without filing a demurrer, goes into an examination of witnesses as to the merits of the whole matter in controversy, he waives all exception to the defect." 2 *G. & J.* 14. *Gibb vs. Claggett,* 10 *G. & J.* 480. No appeal can be taken from the order to account. *Claggett's Adm'r. vs Crawford,* 12 *G. & J.,* 275.

The doctrine of non-accountability to the Court of Equity for the management of the trust as claimed by appellants, is wholly inadmissible, and not sustained either upon principle or precedent. *Dent vs. Maddox,* 4 *Md. Rep.,* 522. *McNeal & Worley vs. Glenn,* 4 *Md. Rep.,* 87.

There is no power in the Methodist Episcopal Church to give effectual relief against trustees for the violations of

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trust complained of. *See Discipline of the Methodist Episcopal Church, ch.* 111, *sec.* 2.

Bowie, C. J., delivered the opinion of this Court.

The appellees "as male members of the African Methodist Episcopal Church of the City of Baltimore, and as next friends of the poor colored children named as *cestui que trusts*, in the deed of John Sinclair to Jacob Gaillard and others, and for all others interested," sue the appellants, Henry Gibbs and others, trustees of the African Methodist Episcopal Church, requiring them to answer on oath, the several matters charged, to render an account of their receipts and disbursements for the last three years, to produce their record book, and praying that the said trustees be removed.

They charge, that by the Act of incorporation, it is made the duty of the trustees of said corporation not to interfere in any wise with the economy of the Church, in the current receipts and disbursements, but it is on the contrary determined and expressly declared that said trustees shall make no additions, alterations or amendments, except by the concurrence of two-thirds of the male members of the age of twenty-one years, etc.

That, in violation of the aforesaid provision, the trustees introduced into the Church building situate in Sharp street, in the City of Baltimore, a part of the property of the corporation of which they are trustees, instrumental music, against the economy of the Church, *and its customary and usual form of worship*, and incurred expenses in consequence thereof, not warranted by the Act of incorporation.

The bill further charged, that the said trustees, in defiance of the provisions of the Articles of incorporation, after having failed to obtain the two-third vote as required,

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continued to allow said instrumental music to be made a part of the worship in said Church, against the wishes and expressed opposition of a large majority of the male members of the said Church, and they have also continued to incur the additional expenses of an organist, wholly unauthorized by said articles and against the letter and spirit of the same.

The appellees further charged, that the appellants by virtue of their appointment, held in trust certain property conveyed by John Sinclair to Jacob Gaillard and others, in trust, that the rents, issues and profits should be applied towards the education of poor colored children, that they had wholly failed to comply with the express provisions of the deed of trust; that they had failed to comply with the provisions of the sixth section of the Act of 1812, January 8th, and its supplement under which the African Episcopal Church was incorporated, which requires the trustees shall keep a record book, and cause to be registered a fair account of all their proceedings, subject at all times to the inspection of the several members of the Church, etc.

They further charged that in all respects the affairs and pecuniary matters of the said Church had been carelessly, negligently and faithlessly conducted for many years, and they were kept in ignorance of the manner and way the large receipts of the burial ground belonging to the Church are expended, and also, of the receipts of other property belonging to the aforesaid corporation, the said trustees refusing to disclose to the members of the Church the true condition of its monetary affairs, etc.

Subsequently, a petition and supplemental bill were filed, making the elder in charge a co-defendant, alleging he had permitted the employment of the organ although

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requested to forbid it, and praying an injunction against the trustee and elder prohibiting them from using or allowing to be used a musical instrument or organ in the public worship of the congregation until the further order of the Court, and praying a subpœna and answers by the defendants to the original and supplemental bill.

An injunction was issued on the 27th of May, 1864, prohibiting the use of instrumental music, with leave to move for a dissolution upon filing their answers, by defendants.

The answers, denying all the allegations of the bill, and particularly that instrumental music is contrary to the custom of the Methodist Episcopal Church or to the law or provisions of the Act of incorporation, and all of the breaches of trust charged by the complainants against the respondents. On the 3rd of June a commission to take testimony was issued by consent of counsel, under which very voluminous evidence was taken. On the same day the respondent's counsel entered a motion to dissolve the injunction.

On the 19th of September the complainants prayed leave to amend their bill, by asking an injunction restraining the trustees from applying the proceeds of the property to any other purpose than that set forth in the deed, to wit: the education of the poor children, etc., and for such other relief, which petition was set down for hearing at the final hearing, by order passed 16th of July, 1864.

On motion of the complainants, on the 21st of September, 1864, the case was set down for final hearing on the 7th of October, 1864, and on the 22nd of September, 1864, the counsel made the following agreement: "*Gibbs et al. vs. Henry Tartar et al.* We agree that this case shall be heard on final hearing this day, and also upon the motion to dissolve the injunction."

On the same day the appellants filed exceptions to the original and supplemental bills, and also to the testimony.

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On the 26th of September, the appellees prayed leave to amend their bill, for the purpose of adding a more definite and full designation of their interest as parties to this suit, by adding after their names and present description the words " and as next friends of the poor colored children named as *cestui que trusts* in the deed of John Sinclair to Jacob Gaillard, etc.," which was granted by order of same date.

The appellants, on the same day, filed exceptions to the jurisdiction of the Court, to remove them as trustees, as prayed in said bills, and also to the averment of the bills, in substance, as follows:

1st. Because as a corporate body, they could not be deprived of their corporate rights in the proceedings instituted against them in this cause.

2nd. They hold none of the powers and trusts set forth in said bills, except as a corporate body, and are not liable to answer for any violation of the same in their individual capacity, in which character they are sued.

3rd. They are sued in respect of three several and distinct subject matters in the same suit.

4th. The complainants have not shown in either of the bills, they have any interest in the suit; all who are in like interest with the complainants are not made parties.

5th. There is no real grievance or cause of complaint, set out with such certainty, that the defendants can answer or the Court determine.

In the view which we entertain of the law of this case, it will not be necessary to examine the voluminous testimony taken and returned under the commission issued in the cause, but to inquire whether the subject matter of the suit is such as the Court can take cognizance of; and if jurisdiction exists, whether the parties complainant and defendant, are such as authorize the relief prayed.

The main object of the bill was, (as observed by the

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Judge below,) the removal of the trustees; the various charges were so many causes alleged, to justify the application for their removal. The injunctions were merely ancillary; if the main object was beyond the jurisdiction of the Court, in the manner presented, the accessories must follow the principal.

The Act of 1802, ch. 111, entitled "An Act to incorporate certain persons in every Christian Church or congregation in this State," does not as in some other States incorporate the congregation or society, but provides "that in every Christian Church or congregation, etc., there shall be and remain sufficient power and authority, in all male persons, above twenty-one years of age, belonging to any such Church, etc., to elect at their discretion, certain sober and discreet persons, not less than five, nor more than thirteen, which persons so elected shall be and are thereby constituted a body politic or corporate; upon being registered as thereinafter directed, to act as trustees in the name and behalf of the particular Church for which they are chosen, and to manage the estate, interest and property of the same in the most upright manner, and shall have perpetual succession, and shall by their name of incorporation have power to sue and be sued."

The Act of incorporation of the appellants formed under this general Act, as explicitly enacts that the powers and authorities given to the trustees shall not be construed to prevent the ministers appointed agreeably to the discipline of the said Church from the use and enjoyment of the Church as heretofore; nor interfere with the economy of the Church; but the current receipts and disbursements shall be under the control and management of those persons who may from time to time be regularly authorized. *Vide secs.* 6 *and* 7.

The persons elected, under the Act of incorporation,

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constitute a body politic, and as such act as trustees holding the estate in perpetual succession, and to manage the same in the most upright and careful manner, according to the discipline of the Methodist Episcopal Church of the United States.

The male members of the Church are invested with no visitorial or controlling power over the minister or trustees, or interest in the property of the corporation; or with any authority, except in the case of selling, or leasing, or amending the articles, when the consent of two-thirds is required.

The right of the ministers in charge, to the use and enjoyment of the Church, (which includes all the uses to which it can be applied for religious purposes,) is expressly reserved to them; and the economy and management of the fiscal affairs, the receipts and disbursements, are as explicitly assigned to those appointed for that purpose, under the discipline of the Church.

Assuming the trust, under the deed of Sinclair, to be vested in the trustees of the African Methodist Episcopal Church of the City of Baltimore, as a body politic and corporate, that corporation has not been made a party to the cause, as it can only be sued in its corporate name.

The defendants, the appellants are sued individually, the designation "trustees of the African Methodist Episcopal Church" superadded being a "*descriptio personæ.*" This is not a mere misnomer, but suing them in a different capacity.

In a similar case the late learned Chancellor BLAND held this language:

"This bill has, however, not only omitted to bring before the Court those whom it appears from its statements have an interest in the claims and pretensions set forth, and also that body who is charged to be the cause of all the alleged

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injury, but it has brought before the Court certain persons who in the capacities in which they stand have not the least interest in the matters in controversy; for where the legal capacities of parties are different, such capacities must be considered as if they were several persons." *Binney's Case*, 2 *Bland*, 108. Which position he sustains by numerous authorities. The appellant's exceptions went not only to the capacity of the complainants to sue, and the liability of the defendants to be sued, but the multifariousness of the bill, the want of jurisdiction over the subject matter, etc.

It is true, as intimated by the Judge below, the usual manner of taking advantage of multifariousness is by demurrer, plea or answer; and it has been held that the defendants have waived all exceptions to that defect by filing their answers and going into an examination of testimony as to the merits. *Gibbs vs. Clagett*, 2 *G. & J.*, 28. But a Court of Equity may "*sua sponte*" dismiss a bill for multifariousness when deemed necessary to the proper administration of justice. *Ohio vs. Ellis*, 10 *Ohio*, 456. *Story's Eq. Pl.*, 284. 3 *How., U. S.*, 333, 412.

The other objections raised by the exceptions to the jurisdiction of the Court, the right of the complainants to sue, the irregularity of proceeding against members of a corporation individually, instead of suing the body politic, in their corporate name, do not seem to have been particularly noticed.

The general rule (as shown by *Chambers vs. Chalmers et al.*, 4 *G. & J.*, 420,) is, that if the infirmity of the plaintiff's case appears upon the face of the bill, the defendant may rely upon it at the hearing, no matter how imperfect or what the character of the answer, and that it is only with respect to some defences given by statute that a

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different rule prevails. *Gibbs vs. Cunningham*, 4 *Md. Ch. Dec.*, 326.

The bill should show the rights of the plaintiff, the manner in which he is injured, and that the case as stated, and the relief asked are properly within the jurisdiction of a Court of Equity. 1 *Mitford's Eq. Pl.*, 37. *Cooper's Eq. Pl.*, 5. *Story's Eq. Pl.*, 23.

An objection to the jurisdiction of the Court or to the capacity of the plaintiff, may be presented at any time, it may be made by demurrer, plea, answer, or taken advantage of at the hearing. 3 *Bland*, 143.

The General Assembly of this State, in its earliest legislation, exhibited the utmost solicitude to avoid all interference with the ecclesiastical affairs of the several denominations of Christians. The Act incorporating certain persons in every Christian Church or congregation enacts, "Nothing therein contained shall be construed, adjudged or taken to abridge or affect the rights of conscience or private judgment, or in the least to alter or change the religious constitution or government of any Church, congregation or society, so far as respects or in anywise concerns doctrine, discipline or worship." *Act of* 1802, *ch.* 116, *sec.* 13.

Singing is recognized as a part of Divine worship, among almost all denominations of Christians. Whether it should, or should not be accompanied with instrumental music, must be determined by those who administer the discipline of the Church to which they belong. With this, as we have seen, the trustees are expressly prohibited from interfering by the terms of their incorporation. If they have intruded upon the office or duty of the minister or steward of the Church, it is no ground for interposition by injunction at the instance of the male members of the congregation, but the remedy is by *mandamus*, at the

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relation of the officer disturbed or ousted. *Vide Act of* 1828, *ch.* 78. *Clayton et al. vs. Carey et al.*, 4 *Md. Rep.*, 30. *Angel & Ames on Corp.*, 704.

If the minister, as charged by the amended bill, has violated the doctrine or discipline of his denomination of Christians, he is responsible to its ecclesiastical tribunals.

Finding some of the allegations of the bill involve questions of "doctrine, discipline or worship," with which this Court has no power to interfere or decide, and the complainants no right to bring before this Court; and other allegations make charges of breach of trust, against a corporation or body politic, which are not properly before this Court, (without deciding whether the complainants have any right to maintain such a suit against the Corporation,) we think the orders granting and continuing the injunctions heretofore issued in this cause should be reversed, the injunction dissolved and the bill dismissed with costs to the appellant.

Orders reversed, injunction dissolved and bill dismissed.

(Decided December 5th, 1865.)

JACOB EAKLE AND OTHERS, *vs.* GEORGE W. SMITH, INSOLVENT TRUSTEE OF AMOS EAKLE.

MARYLAND CODE.—Where execution was issued on the 29th of January, 1861, upon a judgment or decree rendered on the 1st Monday of July, 1860, all proceedings under the latter must be regulated by the Code.

APPEAL: STAY OF EXECUTION.—Under the CODE, ART. 5, SEC. 33, in cases of judgments on which an execution has been issued, "whether the same has been in part executed or not," the filing an appeal bond approved as required, shall stay any execution which has been issued on any such judgment.

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Eakle et al. *vs.* Smith.

The appeal *per se* operates no *supersedeas*, whether the execution be issued or not. The defendant who desires to protect himself from the effects of an execution, if he would avoid all risk of delay, must file the appeal bond immediately. But if he is willing to incur the risk, or unable to give bond earlier, he may defer it until the last moment before execution is consummated, provided he has appealed in time.

The non-payment of the costs of the execution, does not necessarily destroy the effect of the bond as a stay of execution, this requirement of the law being intended for the protection of the Sheriff, not of the plaintiff.

POUNDAGE FEES.—As a general rule the defendant and not the plaintiff is liable for poundage fees. To enable the defendant to pay the costs they must be ascertained by the Sheriff and demanded, and a tender of the costs would be useless, if not impossible, in a case where the Sheriff, without demanding his costs persisted in selling under the execution.

SHERIFF'S SALE, WHO MAY OBJECT TO.—Where the defendant against whom a decree for the payment of money has been passed, subsequently sells his land which is afterwards seized and sold under an execution upon the decree, the defendant as well as his vendee, while the execution proceedings are *in fieri*, has such an interest in the sale as will entitle him to the protection of the Court, if the sale was made without authority, or under such circumstances as necessarily involved a sacrifice.

APPEAL from the Circuit Court for Washington County.

A decree was passed by the Circuit Court for Washington County, as a Court of Equity, bearing date the 20th day of July, A. D., 1860, in the case of George W. Smith, the appellee, as insolvent trustee of Amos Eakle, against the appellant, Jacob Eakle, and a certain Amos Eakle, and decreeing that the defendant, *Jacob Eakle*, pay or bring into this Court to be paid unto the complainant, George W. Smith, as insolvent trustee of the said Amos Eakle the sum of $4,201.30, current money, with interest and costs.

From this decree the said Jacob Eakle appealed on the 14th of August, 1860, and on the 24th day of November, A. D., 1862, filed his appeal bond, which was duly approved on the day following, and before the property was sold by the Sheriff; on this decree and without any order

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or leave of the Court first had, a *fieri facias* was issued out of said Court, on the 29th day of January, 1861, directed to the Sheriff of said county, and reciting, "Whereas, at a Circuit Court, sitting as a Court of Equity, begun and held at Hagerstown, in and for said county, on the first Monday of July, A. D., 1860, a certain George W. Smith, trustee of Amos Eakle, an insolvent debtor, by the decree of said Court recovered against a *certain Jacob Eakle and Amos Eakle,* late of Washington county, as well the sum of $4,201.30, with interest thereon from the 20th day of July, A. D., 1860, till paid, as the sum of $545.68⅔ for his costs and charges by him about his suit in that behalf laid out and expended, whereof the said *Jacob and Amos* are convict, as appears of record. Therefore you are hereby commanded, that of the goods and chattels, lands and tenements of the said Jacob Eakle and Amos Eakle, being in your bailiwick, you cause to be made," &c. This execution was stayed by injunction granted upon a bill filed by Christian Eakle, to whom the said Jacob Eakle had conveyed the lands taken in execution by his deed dated the 3rd day of August, A. D., 1860. The defendant in said bill, George W. Smith, answered the same, and upon a hearing upon bill and answer, the said injunction was dissolved.

The Sheriff then proceeded to sell said property, and advertised the same, and in such advertisement stated that "by virtue of a writ of *fieri facias* issued out of the Circuit Court for Washington county, as a Court of Equity, at the suit of George W. Smith, trustee of Amos Eakle, and to him directed against the goods and chattels, lands and tenements of *Jacob Eakle and Amos Eakle,* I have seized and taken in execution all the estate, right, title, interest, trust, property, claim and demand at law and in equity of the said *Jacob Eakle and Amos Eakle,* in and to the following real estate, (here describing the said farms.) And I

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hereby give notice that on Tuesday, the 25th day of November, 1862, in front of the Court-house in Hagerstown, I will proceed to sell the interest at law and in equity of the said *Jacob Eakle*, in and to the above described tracts of land at public sale to the highest bidder for cash." On said day, as advertised, he sold at public sale the tracts aforesaid, and the Sheriff so made return of his proceedings.

Upon the return of said execution the said Jacob Eakle, the defendant in the decree, came into Court and in two several motions moved the Court to quash said execution and set aside said sales, and at the same time the said Caleb Eakle and William Hammond, as devisees of Christian Eakle, dec'd, came also into Court and made the like motions, and thereupon the said George W. Smith, by his petition, prayed the Court that his said execution be amended by striking out the name of Amos Eakle, upon the ground that the same was a clerical error or misprision of the clerk.

The plaintiff and the purchasers at the Sheriff's sale made answer to these motions, and affidavits were taken and filed by the respective parties, and the cause was heard and the Court, (FREDERICK NELSON being special Judge,) passed an order allowing the amendment of the execution, and overruling the several motions to quash the execution and set aside the sales thereunder, from which said order the appellant, Jacob Eakle, and the appellants, Caleb Eakle and William Hammond, severally appealed.

In the motion made by said Jacob Eakle to set aside said sale, he assigned for cause:

First. That prior to said sale he sued out an appeal from said supposed decree, to the Court of Appeals of Maryland, and, also, had prior to said sales filed an appeal bond, approved by the clerk of the Circuit Court for Washington county, which said bond operated in law as a *supersedeas*

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or stay of proceedings upon said supposed decree and said *fieri facias*.

Second. That due and legal notice of the time and place of sale was not given by said Sheriff.

Third. That no decree, such as is recited in said *fieri facias*, was ever passed by the Circuit Court for Washington county, sitting as a Court of Equity.

Fourth. That said *fieri facias* was issued against wrong parties, because there is one decree of said Court for said sum of money against the defendants named in said execution.

Fifth. That no schedule or list of the property taken under said *fieri facias*, with the value set upon it by proper appraisers, was made by said Sheriff and returned with said execution.

Sixth. That said lands were sold at a grossly inadequate price.

In the motion of the said Jacob Eakle to quash said execution he assigned for cause:

1st. There is no such decree of the Circuit Court for Washington county, as that recited in the writ of execution.

2nd. The said writ of *fieri facias* was issued at the instance of the said George W. Smith, trustee, without first having obtained the order of this Court authorizing it, and was issued without authority—was premature and contrary to law.

The said Caleb Eakle and William Hammond, as devisees of Christian Eakle, dec'd, came into Court at the same time, and filed their motion to set aside said sales, and assigned the same causes as the said Jacob Eakle, as aforesaid, and also filed their motion to quash, and assigned the same causes assigned by the said Jacob Eakle, with the additional third cause, that the decree, under which the said *fieri facias* was alleged to have been issued,

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was not passed by said Court until after the execution and recording of said deed from said Jacob to Christian Eakle; and although it bears date anterior to said deed, the said Christian Eakle gave no consent to its being ante-dated, and that the same was done by said Court in derogation and violation of his rights, and that as to him, and those claiming under him, the said decree was illegal. The said Caleb Eakle and William Hammond claim a right to come into Court and make their motions, upon the ground that the said decree, whilst bearing date as of the 20th day of July, A. D., 1860, was not, in fact, passed by the Court until a considerable time thereafter, and on or about the 14th day of August, 1860. That on the 3rd day of August, and before the passing of said decree, the said Jacob Eakle sold and conveyed by his deed of that date, duly executed and recorded, said real estate to said Christian Eakle; and that afterwards, and on the 4th day of April, 1861, the said Christian, by his last will and testament, devised one of said farms to said Caleb, and a certain sum of money, to be derived from the sale of the other of said farms, to said William Hammond, by reason of which they are affected by said sales, and have a right to be heard in these proceedings.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, and COCHRAN, J.

Wm. T. Hamilton and *O. Miller* for the appellants.

Under such motions "it is the necessary practice to examine into all the facts by parol or other proof, and not regard technical estoppels." *Moreland vs. Bowling*, 3 *Gill*, 501. *Marshall's Lessee vs. Greenfield*, 8 *G. & J.*, 349. *Miles vs. Knott*, 12 *G. & J.*, 442. *Monahan vs. Scammon*, 3 *Md. Rep.*, 471. *Trail use of Buckey vs. Snouffer*, 6 *Md. Rep.*, 309. *Jackson vs. Robins*, 16 *Johnson*, 573.

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Then as to the first cause assigned by the appellant, Jacob Eakle, for setting aside said sales, viz: That prior to these said sales he had sued out his appeal bond, which was duly approved by the clerk. The appeal in the cause was taken in time, being taken on the same day or the day after the decree was in fact passed.

The Act of 1826, chap. 200, provided that no execution should be stayed or delayed, unless the person appealing should immediately on praying such appeal enter bond, &c.; the same provision is in the Code, page 25. The practice has been not to file it immediately. The bond is designed to stay execution, and in such stay at the same time protect the rights of the party having the judgment or decree, and secure him against loss or injury. But we contend that by the Act of 1840, chap. 232, it is provided simply, that in all cases of appeal from the judgment or decree of any Court of this State, wherein an appeal is by law allowed, the filing of an appeal bond, approved as the law prescribed, shall stay any motion which may or has been, or shall be issued on any such judgment or decree, whether such execution may have been in part executed or not, &c. Where, then, an appeal is taken in time, as in this case, this act allows the bond to be filed where the execution has in part been executed, and without limit as to time, so that the execution is not fully executed. And this appears to be right in principle, for whilst the party for whose benefit the bond is given is altogether protected, and so the party giving the bond if the cause should be ultimately decided for him, and which might not be the case in fully executed process. We contend that the Act of 1840 governs this case. These proceedings were commenced before, and were pending at the adoption of the Code; and by the Code, page 9, all such suits pending at the time of its adoption, should be proceeded with as if the Code had not been adopted.

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The Act of 1840, as also the Code, provides further, that the party executing said bond shall pay to the Sheriff the costs of execution. This is for the benefit of the Sheriff only. Where the Sheriff was notified in this case of the bond, he made no claim for costs, nor did he exhibit the amount. The appellant, Jacob Eakle, did not and would not know them, and being for the benefit of the Sheriff, he should have properly presented his bill of costs. He can by his acts surely obviate the necessity of such judgment of costs, and still the bond remain effectual for all purposes.

As to the 2d cause assigned by the appellant, Jacob Eakle, viz: That due and legal notice of such sales was not given by the Sheriff. The return of the Sheriff shows that he set up notice of such sale at the Court-house door only, and published the same in one newspaper. The Act of 1816, chap. 129, requires notice to be set up at the Court-house, and at other public places in the county. See *Moreland vs. Darling*, 3 *Gill*, 500. The Code, page 587, sec. 4, only requires the notice to be set up at the Court-house door, and published in one newspaper.

We contend, as in the preceding proposition, that the Act of 1816 governs these proceedings by virtue of the first Article above referred to. Besides, the Sheriff in his advertisement of sale proclaims that he seized the interest of both defendants in the execution, and then proposes to sell the interest of but one. He creates the impression that both have an interest, and then follows that impression by selling the interest of one only. His advertisement had a tendency to create distrust and repress bidding in the common mind.

As to the 3d cause assigned, viz: That there is no such decree as recited in this execution, and the 4th cause assigned, viz: that said *fieri facias* was issued against wrong parties, because there is no decree of said Court for said sum of money against said defendants named in said execution.

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We hold that the amendment was improperly allowed at the time, and that the objection taken at the return of the execution to the manifest error of the execution, and whilst proceedings were in force, are fatal to it as to the sale.

All inequalities and errors can be taken advantage of at the return of the execution, and it is proper and indeed only time to do it; the proceeding is voidable only and not absolutely void. *Manahan vs. Scammon*, 3 *Md. Rep.*, 471. *Tomlinson's Lessee vs. Devore*, 1 *Gill*, 348. *Clarke vs. Diggs*, 5 *Gill*, 109. *Moreland vs. Bowling*, 3 *Gill*, 501. *Barney vs. Patterson*, 1 *Gill*, 204. *Marshall's Lessee vs. Greenfield*, 8 *G. & J.*, 349. *Miles vs. Knott*, 12 *G. & J.*, 442. *Trustees of the Poor vs. Pratt*, 10 *Md. Rep.*, 5. *Elliott vs. Knott*, 14 *Md. Rep.*, 121. *Jackson vs. Bartlet*, 8 *John.*, 361. *Jackson vs. Robins*, 16 *John.*, 573. *Waters vs. Duvall*, 6 *G. & J.*, 79. *Stat. of Jeofails, and Act of* 1852, *ch.* 180, *sec.* 4. 2 *Tidd's Pr.*, 768, 769.

It is admitted that irregular or wrongful process cannot be inquired into collaterally, and upon this there are numerous decisions in this State. And for this class of cases we also refer to the cases last above cited.

But in this case, where the question is directly at issue, the reverse must be the law. The appellant well aware of this, hoped to perfect his process by amendment. *Prather vs. Manro*, 11 *G. & J.*, 261.

The amendments are made in a large class of cases; some where rights are not finally determined, but where parties are heard upon their whole case after amendment; some where no injury is or can be sustained; some where rights are secured, and where not to amend gross injustice would be done to parties; the whole matter of amendment seems to go to the protection of rights attained or secured. And for this class of cases we refer to *Bryan vs. McPherson*, 12 *G. & J.*, 157. *Prather vs. Manro*, 11 *G. & J.*, 261. *Bank of Maryland vs. Lyles*, 11 *G. & J.*, 332. *Roby*

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vs. Turner, 8 *G. & J.*, 132. *Clarke vs. Digges*, 5 *Gill*, 109. *Trail use of Buckey vs. Snouffer*, 6 *Md. Rep.*, 308. *McCoy vs. Boyle*, 10 *Md. Rep.*, 391. *Green vs. Hamilton*, 12 *Md. Rep.*, 326. *Boteler vs. Belt*, 7 *G. & J.*, 113. *Case vs. McGee*, 8 *Md. Rep.*, 114.

In contemplation of law all wrongful process against a party is injurious; here it is not against the person, but against property in the sale of which the confidence and knowledge of bidders are involved, and upon the regularity of process so much depends, and because of which the defendant has his day in Court to show such errors, and be relieved from the injuries caused, or which might have been caused by them.

But here by this amendment no such consideration is allowed. The wrong is perpetrated without redress, and though in time before the Court, and at the very and only time when required to be there, no inquiry as to the possible or legal effect of such wrongful process upon bidders or probable value of property, is to be allowed, but the amendment is to be allowed as a matter of course.

This cannot be the law, and we think that upon a critical examination of all the authorities, the Court will observe that there is no such exercise of power laid down in any of the books. We must be careful to distinguish between this case, when the error is directly attacked, and attacked at the right time and by the proper party, and when it is attacked collaterally; for in the latter case the rights of third and innocent parties intervene, and as between the error which might have been taken advantage of by the defendant at the proper time, and was not so taken, and the injury which would enure to such innocent parties after the payment of this money and disposition of it by them attacking it, the Courts having to protect such persons, established the first and equitable principles that they should not be disturbed. The authorities already referred to show these principles.

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As to the fifth cause assigned, viz: that no schedule or list of the property taken under said *fieri facias*, with the value set upon it by sworn appraisers, was made by said Sheriff and returned with said execution. There must be a valid seizure to make the execution effective. *Beatty vs. Chapline*, 2 *H. & J.*, 9. *Berry vs. Griffith*, 2 *H. & G.*, 337. *Peter vs. Magruder*, 11 *G. & J.*, 217. *Waters vs. Duvall*, 11 *G. & J.*, 37.

In this case there was no valid seizure made, and schedule of appraisement by sworn appraisers. We hold that this is required. *Evans' Practice*, 366, 367. *Beatty vs. Chapline*, 2 *H. & J.*, 7, 9.

Since the case of *Beatty vs. Chapline*, the uniform practice is to make a schedule of appraisement, and among the great number of cases we give the following to show the established practice: 2 *Harris' Entries*, 166, 362, 363. 2 *Evans' Harris*, 505. *Evans' Practice*, 367. *Barney vs. Patterson*, 6 *H. & J.*, 182. *Barry vs. Griffith*, 2 *H. & G.*, 338. *Frederick vs. Floyd*, 1 *H. & G.*, 172. *Thomas' Lessee vs. Tenney*, *Id.*, 435. *Clarke vs. Belmear*, 1 *H. & J.*, 433. *Marshall's Lessee vs. Greenfield*, 3 *G. & J.*, 350. *Waters vs. Duvall*, 11 *G. & J.*, 47. *Campbell vs. Booth*, 8 *Md. Rep.*, 108. If there be no statute requiring it, the uniform practice must surely establish it as requisite. *Shafer vs. Stonebraker*, 4 *G. & J.*, 344. *Creecy vs. Lawson*, 2 *Gill*, 68. *State vs. State use of Ducker*, 2 *Md. Rep.*, 284. *Pegg vs. Warford*, 7 *Md. Rep.*, 582. *Whitehouse vs. State*, *Id.*, 442.

The 2d cause assigned for quashing the execution is, that the said "writ of *fieri facias* was issued at the instance of the appellee, without first having obtained the order of the Court authorizing it, and was issued without authority." The order of the Court must first be had. The law, we contend, requires it. *Alexander's Ch. Practice*, 199, 200, 201, 202. *Act of* 1785, *chap.* 72, *sec.* 25. 1 *Dorsey*, *page*

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222. *Code, sec.* 118, *Art.* 16, *page* 96. *Owings vs. Worthington*, 4 *Md. Rep.*, 260. *Keighler vs. Ward*, 8 *Md. Rep.*, 254.

By the Act of 1785 and the Code, the appellee was entitled, at his option, and upon petition to the Court, to have an order passed directing a writ of sequestration, or for injunction, or *fieri facias* to issue. The wrong in this case arose in failing to comply with the law in this respect. Upon petition the Court would have directed the proper execution to issue. The effort of the appellee now is, by amendment, to correct a wrong process wrongfully issued. This summary correction of gross errors and utter abnegation of others, in legal process, is carrying the doctrine too far. If laws are passed and rules established for wise purposes enforce them. If not, repeal and abrogate them; but whilst acknowledged to be in force let them have their legal effect and consequences like all established laws and rules ought to have when they are invoked in the proper place, and at the proper time, and by the proper person. It is said that such an order would have passed as a matter of course. Certainly, if in the opinion of the Court it were right; it was refused in the case in 4 Md. Rep., above referred to.

Before proceeding to notice the motions filed by the appellants, Caleb Eakel and William Hammond, it may be proper to refer to an objection urged by the appellee to the standing of the appellee, Jacob Eakle, in the Court, or his right to be heard in the cause. This objection is urged upon the ground that he had conveyed the property sold under this execution to Christian Eakle. It is contended that in two respects he is entitled to be heard:

First, as the defendant in the cause. The authorities before referred to, *Moreland vs. Bowling*, 3 *Gill*, 500, *&c.*, maintain the right of the defendant to appear and take advantage of whatever errors there may be in the process.

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2nd. That by the said deed of conveyance to Christian Eakle he covenanted for further assurance to the said Christian Eakle. This covenant for further assurance puts Jacob Eakle in much interest in these proceedings. He is obliged under this covenant to remove all judgments and other incumbrances. *King vs. Jones & Rowland*, 5 *Taunt.*, 416. 1 *Eng. C. L. Rep.*, 139. *Platt on Covenants*, *vol.* 3, *Law Library*, 153. 2*d Sugdon on Vendors*, 767.

The additional and other cause assigned by the said Caleb Eakle and William Hammond is, that the decree, under which said execution was issued, was not passed by said Court until after the execution and recording of said deed from Jacob Eakle to Christian Eakle, and without the consent of the said Christian, and that the same was in violation of his rights, &c. They are affected by said sales, and all persons affected must take notice of them, and as they, therefore, are properly before the Court objecting to his claim upon the whole case, it is contended that the said sales ought to be set aside.

Thos. S. Alexander and *R. H. Alvey* for the appellees.

The Court ordered the writ to be amended, and in support of this part of the order the appellees insist:

1. That the Circuit Court has a clear authority to amend a *fieri facias*, to correct a misrecital therein of the judgment or decree in execution of which it was issued. 2 *Tidd's Practice*, 713, 1020, 1028. *Browne vs. Hammond*, *Vide Barnes*, 16. *Laroche vs. Wasbrough*, 2 *T. R.*, 737. *Stevenson vs. Curtle*, 1 *Chitty*, 349. *M. Carmack vs. Melton*, 1 *A. & E.*, 313. *Porter vs. Goodman*, 1 *Cowen*, 413. *Owens vs. Sampson*, 3 *Watts*, 87. *Trail vs. Snouffer*, 6 *Md. Rep.*, 315.

2. The authority to amend rests in the discretion of the Circuit Court, and from the exercise of this decision

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no appeal will lie. *Ellicott vs. Eustace*, 6 *Md. Rep.*, 506. *Scales vs. Cheere*, 12 *M. & W. Mellish vs. Richardson*, 1 *Clarke & Fin.*, 221. In truth the discretion was rightly exercised, as it is apparent that the misrecital was nothing more than a misprision of the clerk. *Alex. Ch. Pr.*, 281.

3. The sale by the Sheriff was only of the interest of Jacob Eakle; he could not convey as against Smith, his creditor, and the purchasers are substituted by law in the place of the creditor, under whose execution the land was sold. *Spindler vs. Atkinson*, 3 *Md. Rep.*, 423.

And while the deed may be fraudulent and void, as against Smith, and the purchasers under his execution, it is perfectly good and binding as between the parties, and against the grantor and those claiming under him; and it is competent to the creditor or the purchasers under his execution to set up or rely upon the deed, by way of estoppel or preclusion of the grantor, and yet impeach it as void against themselves. *Seal vs. Duffy*, 4 *Barr.*, 274. *Kinnemon vs. Miller et al.*, 2 *Md. Ch. Dec.*, 407. *Cushwa vs. Cushwa*, 5 *Md. Rep.*, 44.

But whether it be void or not, the deed conveyed, as against Jacob Eakle, all his interest and title in and to the land; and so far from the sale being an injury to him, it is manifestly to his benefit that an interest that he could not claim has been sold in discharge of his debt.

But it has been urged that Jacob Eakle is bound on his covenants in his deed, and is thus interested in sustaining his motions.

The deed contains two covenants; one of general warranty, and the other, that the grantor will "make and lawfully execute, acknowledge and deliver all and every such further and other deeds, conveyances and assurances in law, whatsoever, for the better and more fully conveying and assuring" to the grantee the land conveyed.

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To constitute a breach of the covenant of general warranty there must be an eviction under title existing at the date of the covenant. *Ellis vs. Welch*, 6 *Mass.*, 246. 2 *Greenlf. Ev., sec.* 244.

And under the covenant for further assurances, as used in the English practice, wherever it is covenanted, that the grantor "will make, do and execute, or cause and procure to be made, done and executed all and every such further and other lawful and reasonable act and acts, thing and things, conveyances and assurances in the law whatsoever, for the further, better, more perfect and absolute granting, conveying and assuring," &c., the grantee or his heirs, may by force and construction of the terms, "do reasonable acts and things," call for the removal of a judgment or other incumbrance. *Platt on Cov.*, 341, 344. *King vs. Jones*, 5 *Taunt.*, 427. 4 *Maule and Selw.*, 188. *Cro. Jac.*, 251. *Cro. Car.*, 503, 505.

It will be perceived that the covenant in this deed embraces no such terms as those in the English covenants, under which the removal of incumbrances can be required; nor does the covenant under consideration contemplate anything more than the making of other or further deed of conveyance if required.

Here, however, according to the sworn allegation of Christian Eakle, in his bill to obtain the injunction to restrain the execution, and according to the allegation made in this cause by the devisee, the decree was not in existence at the date of the deed, nor for many days after; and if such be the case, (and they could not contend the contrary,) clearly, they could never allege a breach of the covenant; and, moreover, if their allegations as to the ante-dating of the decree be true, and the deed was *bona fide* and for value, and without notice, no one could contend that the title under the deed could be prejudiced by the decree.

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The devisees of Christian Eakle have no day in Court on the return of the *fi. fa.*, nor any interest in the matter, to entitle them to apply to have the execution quashed and the sale set aside. The sale was only of the interest of Jacob Eakle, and until the right and possession of Christian Eakle, or of his devisees under the deed, be disturbed by process to dispossess them, they have no day nor right to move in Court, and then only in reference to the process, by which they may be sought to be disturbed. *Waters vs. Duvall*, 6 *G. & J.*, 76. *Spencer vs. Ragan*, 9 *Gill*, 480. *Glassel's Adm. vs. Wilson's Adm.*, 4 *Wash'g C. C. R.*, 59. 5 *John*, 97, 99. 1 *Cow.*, 199. Nor can their rights, if any they have, be adjudicated on this summary motion. 6 *H. & J.*, 23, 24. 2 *H. & G.*, 469. 8 *Md. Rep.*, 254.

4. By going into equity for relief against the decree and execution, and the pendency of those proceedings, Christian Eakle and those claiming under him are precluded from setting up the same ground of relief in this case. They are not allowed to prosecute two proceedings for the same relief, and the right to proceed under the execution and make the sale of the land levied on, was determined by the order dissolving the injunction. *Munnikyson vs. Dorsett*, 2 *H. & G.*, 374. *Mitford Eq. Pl.*, 290, *top, and* 248 *side.*

5. And the overruling of the motion to quash the *fi. fa.* is not the subject of an appeal, the order in that respect being of an interlocutory character. *Baldwin vs. Wright*, 3 *Gill*, 241. *Welsh vs. Davis*, 7 *Gill*, 366. *Hebb vs. Hebb*, 5 *Gill*, 506.

6. The deed to Christian Eakle having been declared void as against the execution since the appeal taken, and the pretension of the devises being thus destroyed, they can make no further claim to be heard on their appeal, and it should therefore be dismissed. *Cleveland vs. Chamberlain*, 1 *Bl. U. S. Rep.*, 419.

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II. If the foregoing positions do not dispose of the case, then it is insisted that the several grounds assigned for the motions made are wholly untenable, and are insufficient to affect either the validity of the execution or the sale thereunder; and—

1. The filing of the appeal bond by Jacob Eakle at the time and under the circumstances operated no stay of the execution on the decree appealed from. The 31st section of Article 5 of the Code provides that "no execution upon any judgment or decree in any Court of law or equity shall be stayed or delayed, unless the person against whom such judgment or decree shall be rendered or passed, shall immediately, upon praying an appeal from any such judgment or decree, enter into bond with sufficient securities in at least double the sum recovered by such judgment or decree," conditioned "that if the said party appellant, or party suing out such writ of error, shall not cause a transcript of the record and proceedings of the said judgment or decree to be transmitted to the Court of Appeals within the time required by law, and prosecute," &c.

The bond filed by Jacob Eakle contains the condition prescribed by this section; and as the law requires the appeal to be taken within nine months, and the record to be transmitted to the Court of Appeals within nine months from the time of the appeal taken, it stipulates to do an impossible thing; to do that in the future which ought to have been done in the past, and that after more than twenty-seven months from the time of the appeal prayed, and the lapse of more than sufficient time within which the appeal ought to have been prosecuted and disposed of. That important part of the condition which has for its object the prevention of delay, is perfectly nugatory in this bond and of no sort of benefit to the appellee. The party

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having nine months within which to enter his appeal, he may delay it until the last day of the time, and though an execution may have issued in the meantime, if it be not executed, the filing an appeal bond will stay the execution; "and the Sheriff or other officer in whose hands the execution may be, shall, upon exhibition to him of satisfactory evidence that an appeal bond has been filed and approved, and upon the receipt of the costs which have accrued in said excution, stay all further proceedings and deliver up the property." Sec. 33 of Art. 5.

By these sections the bond is required to be filed immediately upon praying the appeal, and unless it be done the law is express that no execution shall be stayed or delayed. And if a bond filed upon praying an appeal be rejected for insufficiency, and the party desires to file a new bond, it is necessary in order to be dispensed from the force of the term "immediately," to obtain a grant from the Court of further time to file such new bond, and when the new bond is filed it has relation to the time of filing the first. This provision would be wholly useless if filing a bond at any time without reference to the time of praying the appeal would operate a stay. Art. 5, sec. 35. *Saltmarsh vs. Tuthill*, 12 *How.*, 387. *Adams vs. Law*, 16 *How.*, 144.

As to the legal construction of the word "immediately," when used in a statute, see *Grace vs. Clinch*, 4 *Adol. & Ell., N. S.*, 606. (45 *Eng. C. L. Rep.*, 605.) *Thompson vs. Gibson*, 8 *M. and W.*, 281, 287.

2. It is not shown what satisfactory evidence was furnished the Sheriff that the bond had been filed and approved; but it is clearly shown that the costs on the execution were not paid nor tendered to the Sheriff. The receipt of the costs by the Sheriff is an express condition upon which the execution could be stayed, and the Sheriff

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could not waive or forego the compliance with it, as the bond filed, if valid at all, furnished no indemnity or security for costs accrued on the execution.

3. That due notice was not given, was not contended in the Court below, and it is supposed will not be contended here. The Sheriff's return shows the notice to have been regular. The objection grounded on the variance between the *fi. fa.* and decree is disposed of in the amendment that has been made, whereby the writ is made to conform to the decree. The variance however could not have prejudiced the right of the purchasers; for while the process may have been erroneous by reason of the variance it was not void, and "such error would not affect the title of a purchaser, acquired by a sale under it." *Miles vs. Knott*, 12 *G. & J.*, 442, 452. 4 *Wend.*, 464; 12 *Wend.*, 96, 97.

And so in regard to the objection that no previous order was obtained for the *fi. fa.*, for if it were an objection at all, it would only be one of a formal irregularity in no manner affecting the validity of the process. In *Jeanes vs. Wilkins*, 1 *Ves., Sen., Lord Ch.* HARDWICK says: "To avoid the sale and title of the defendant, it must be proved that the *fi. fa.* was void, and conveyed no authority to the Sheriff; for it might be irregular, and yet, if sufficient to indemnify the Sheriff, so that he might justify in an action of trespass, he might convey a good title, notwithstanding the writ might be afterwards set aside." 5 *John.*, 97-100. 2 *Tidd's Pr.*, 1072.

But by the established practice of the Courts of the State, the clerks issue, without previous order, *fi. fas.* on decrees like the one in this case, being simply for the payment of money; for if the order had been applied for, it would have been granted as a matter of course. *Alex. Ch. Pr.*, 201. And the Legislature has recognized the practice, and as it would seem made it the duty of the clerks to issue on such decrees upon application of the plaintiff therein.

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Code, *Art.* 10, *secs.* 30, 32; *Art.* 16, *sec.* 118; *Art.* 18, *sec.* 5; *Art.* 75, *secs.* 96, 104.

If it were the practice, however, to obtain the formal order for the *fi. fa.*, before issuing it, yet after the issue and execution thereof, as in this case, the Court would sanction and ratify such issue, and the proceedings thereunder. As in the case of *Harris vs. Alcock*, 10 *G. & J.*, 226, 252, where the Court said, "A Court of Equity will always ratify and confirm that when done, which as a matter of course, if previously applied to, it would have ordered to be done. If after the levy and before the sale under the execution in question, the Court had been called on by the appellee, to decree the sale of the property seized under the execution, the relief asked for would have been unhesitatingly granted. The sale then having been made by the appropriate legal officer, so far from setting aside the proceedings under the execution, the Court, if applied to for that purpose, had it been necessary, would have decreed the ratification of the sale which had been made." *Tyson vs. Mickle et al.*, 2 *Gill*, 376. See also *Clark vs. Abbott*, 1 *Md. Ch. Dec.*, 474.

4. The objection to the decree that it bears a date not of the time that it was actually passed, if founded in fact, cannot be considered in this proceeding. The decree stands for what it purports to be on its face, until reviewed or reversed in a proper and solemn manner. *Pheltz vs. Pheltz*, 1 *Md. Ch. Dec.*, 455. *Lovejoy vs. Ireland*, 19 *Md. Rep.*, 56. And if it were even apparent that there was error in the decree, the purchaser would not be affected thereby, for the *fi. fa.* gave the Sheriff the power of sale, and the purchaser's title is protected by it, though the decree should be afterwards reversed. *Elliott vs. Knott*, 14 *Md. Rep.*, 121. *Bennett vs. Hamille*, 2 *Sch. & Lefr.*, 566.

5. It is objected that the Sheriff had no regular appraise-

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ment of the land after his levy thereon, and there is nothing in the case to show whether such was the fact or not. It is contended, however, if such an empty form is proper in a case like this, that it will be presumed to have been done; that the Sheriff is presumed to have discharged his duty, if it does not affirmatively appear that he has not. *Hanson vs. Barnes*, 3 *G. & J.*, 359. But there is no law requiring such appraisement to be made of land seized under execution; and the Sheriff is allowed no fee for such service. Code, Art. 38, sec. 27. And though such appraisement may be made in many instances, if it was omitted in this case, it could not have prejudiced any one; certainly not Jacob Eakle, who disclaimed having any interest in the land seized. And the form of appraisement was, or would have been, useless and senseless, as the interest of Jacob Eakle was, at the time, wholly incapable of valuation.

The omission, however, of the appraisement, if it was in fact omitted, would in no manner affect the title of the purchasers under the levy. Ch. JOHNSON said, when speaking of the manner of conducting a judicial sale by an officer of the Court, and of the rights of a purchaser thereunder, "that a *bona fide* purchaser is not to lose the right, which he supposes he was acquiring when dealing with its (the Court's) agents, upon objections upon the modal regulations of the sale, the non-observance of which is not shown to have been injurious. *Gibbs vs. Cunningham*, 1 *Md. Ch. Dec.*, 44, 52. 8 *G. & J.*, 349. 3 *Pet.*, 339, 340. The purchaser's title depends on the judgment, the levy, and the sale; and all other questions are between the parties to the judgment and the Sheriff. *Wheaton vs. Sexton*, 4 *Wheat.*, 503, 504. 2 *Tidd's Prac.*, 1072.

It is the sale of the Sheriff which vests the title in the purchaser, and if there has been a levy, it in no manner depends upon such a previous formality as an appraisement. *Barney vs. Patterson*, 6 *H. & J.*, 182. *Estop vs. Weems*,

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6 *G. & J.*, 303, 305. *Waters vs. Duvall*, 11 *G. & J.*, 37. *Tomlinson vs. Devore*, 1 *Gill*, 345.

6. As to the alleged inadequacy of price, the objection certainly comes with an ill grace, after all the warnings, threats and menaces that were put forth on the day of sale to deter bidders. Considering all the circumstances, the price was by no means inadequate. *Cushwa vs. Cushwa*, 5 *Md. Rep.*, 55.

Bowie, C. J., delivered the opinion of this Court.

A *fieri facias*, issued out of the Circuit Court of Washington county, as a Court of Equity, on the 29th of January, 1861, at the suit of the appellee, against Jacob and Amos Eakle, was returned on the 13th of March, 1863, on which day the appellants appeared and moved the Court to set aside the sale and quash the execution. At the same term, the appellee moved for leave to amend the writ. Orders to show cause were passed, and after testimony taken the Court below ordered the writ of *fieri facias* to be amended, and overruled the motions to set aside the sale and quash the writ, from which several orders this appeal is taken.

Many points of much interest in practice have been raised by the briefs, but one or two only are necessary to be considered, for the decision of the cause.

Whether judicial writs are amendable or not, is not one of these. The statute of *Jeofails* generally applies to proceedings at common law, and such as occur prior to the verdict or judgment. If the further execution of the writ was suspended by the operation of the appeal bond, it is immaterial whether the writ was regular or irregular.

The execution having been issued on the 29th of January, 1861, and the judgment or decree rendered on the first Monday of July, 1860, all proceedings

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under the latter must be regulated by the Code. The provisions of the Acts of 1826, ch. 200, and of the Act of 1840, ch. 232, are virtually condensed in Art. 5, sections 31 and 33, title appeals. There is no ambiguity in the meaning of those clauses, when read with due regard to their several subjects. The first refers to judgments, on which no execution has been issued; in which case no stay or suspension of the right of execution occurs, unless cotemporaneously with the appeal, or "immediately," to use the language of the Code, "upon praying an appeal from any such judgment or decree, or suing out a writ of error" bond as therein prescribed, be entered into, and approved.

The next class is judgments on which any execution has been issued, "whether the same has been in part executed or not." In this section, the 33rd, "the filing of an appeal bond approved as aforesaid, shall stay any execution which has been issued on any such judgment or decree." Both presuppose the appeal to have been taken in due time. The appeal *per se*, operates no *supersedeas*, whether execution be issued or not. The defendant, who desires to protect himself from the effects of an execution, if he would avoid all risk of delay, must file the bond immediately, for until then he is exposed to execution. On the other hand, if he is willing to incur that risk, or unable to give bond earlier, he may defer it till the last moment before execution is consummated, provided he has appealed in time.

The non-payment of the costs, does not necessarily destroy the effect of the bond as a stay of execution. It is clear from the context, that provision was mandatory to the Sheriff, requiring him to stay all further proceedings, and deliver up the property upon receipt of the costs. It was for his protection, not the plaintiff's. He might refuse to suspend and deliver the property, until the costs were paid, or he might waive his claim. Other parties who

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were fully indemnified by the bond, could not complain. As a general rule, the defendant and not the plaintiff, is liable for poundage fees. To enable the defendant to pay the costs, they must be ascertained by the Sheriff and demanded. In this case, according to the testimony, there was no demand of the costs, "but the Sheriff persisted in selling the lands under the execution." Under such circumstanees, it would have been useless, if not impossible to tender the costs.

Neither is there any question as to the right of the defendant, in the execution, to appear at the return day, and move to quash the writ or set aside the sale for irregularity. *Moreland vs. Bowling,* 3 *Gill*, 501. *Nelson vs. Turner*, 2 *Md. Ch. Dec.*, 77. *Waters vs. Duvall*, 6 *G. & J.*, 79. *Waters vs. Peach*, 3 *G. & J.*, 412. The proceedings were "*in fieri*," the defendant, and those claiming under him, subsequent to the decree, were liable to be evicted under a writ of *habere facias*, if the sale should stand without objection. Notwithstanding his conveyance, he had such an interest in the sale, as entitled him to the protection of the Court, if the sale was made without authority of law, or under such circumstances as necessarily involved a sacrifice.

These reasons being sufficient to warrant the reversal of the order of the Circuit Court for Washington County as a Court of Equity, passed the 11th of September, 1863, refusing to set aside the sale. We deem it unnecessary to consider the other points raised by the appellants.

Order reversed, with costs to the appellant.

(Decided December 5th, 1865.)

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JAMES GIDDINGS *vs.* WILLIAM R. SEEVERS AND AUGUSTUS F. SEEVERS.

The firm of S. & H. having purchased of J. G. certain machinery in the "Valley Factory," on credit, gave their notes for the purchase money, to secure which, they executed on the 31st of March, 1851, a deed of trust to W. T. D., in which they agreed to insure the said property to the amount of the debts secured by the deed. The insurance was accordingly effected and all debts secured by the deed paid, except two notes to Giddings, one for $2,000 and the other for $1,124. On the 15th of Jan., 1852, M. A. D. became a member of the firm, thereafter styled S. H. & Co., with full knowledge of the deed of trust and recognizing its binding effect upon the new firm. On the 19th of Nov., 1852, the property was destroyed by fire. On the 20th of Nov., 1852, M. A. D. in the name of the firm assigned the policies of insurance then in force to A. F. S. & W. R. S. to secure the payment of two notes, neither of which was then due, one for cotton purchased by the firm of S. H. & Co., from A. F. S. & W. R. S., and the other for a note endorsed by the latter for a commission and afterwards paid by them. On the 2nd of Dec. S. & H. jointly assigned the money due on the policies to W. T. D., trustee as aforesaid, for the benefit of J. G., describing themselves as the acting partners of S. H. & Co. In an action of assumpsit by W. R. S. & A. F. S., against J. G., submitted on the above facts, HELD:

1st. That the agreement contained in the deed of trust to insure for the benefit of J. G., secured to him the proceeds of any insurance when effected, and when M. A. D. became a member of the firm with full knowledge of the agreement and obligation to insure for the benefit of J. G., any insurance effected by the new firm was equally affected by the lien of J. G., and M. A. D. could not divert it from this purpose.

2nd. That W. R. S. & A. F. S. as general creditors, trusted to the personal credit of the firm alone, J. G. relying also on the security of the insurance, and if the assignment of the insurance to them were sanctioned they would derive advantage from a fund to which they did not look, and J. G. would be deprived to that extent of that on which he specially relied.

APPEAL from the Superior Court of Baltimore City.

This was an action of *assumpsit*, instituted by consent in the Superior Court of Baltimore City, to determine the respective claims of the appellant and appellees to a sum of money, the proceeds of two policies of insurance, effected on property which was consumed by fire.

Exception.—At the trial of the cause, after the facts

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stated in the opinion of this Court, had been given in evidence to the jury, the plaintiffs offered the three following prayers:

Plaintiffs' 1st Prayer.—If the jury shall find from the evidence that Ira Stanbrough, John R. Holliday, and Mark A. Duke were partners, carrying on the Valley Factory at Harper's Ferry, Virginia, under the firm of Stanbrough, Holliday & Co., on the 20th of January, 1852, and that they did on that day effect the insurances for one year on the movable machinery in said mill, of one thousand dollars each, testified to by the witness, Robert M. Proud, and that the property insured was destroyed by fire on the 19th of November, 1852, and immediately thereafter the interest of the said firm under the insurances aforesaid was assigned by the orders offered in evidence to the plaintiffs to secure the payment of the notes of $282, and $1,253.94 respectively, that have been offered in evidence, and that said notes were given by the said firm in the course of its business, and that notice of such assignment was forthwith given to the insurers, then the verdict must be for the plaintiffs under the agreement in this cause, even though the jury should believe that there had been a prior partnership between the said Ira Stanbrough and John R. Holliday, under the firm of Stanbrough & Holliday, by which a deed of trust had been executed to William F. Daugherty on the 21st of March, 1851, to secure the indebtedness to the defendant therein mentioned, and providing for the insurance to the amount thereof, of the property therein described, and stipulating that in default in the insurance of the said property, the said Daugherty should execute the trust under said deed according to the laws of Virginia, in such case made and provided, and which insurance had been effected under the policy for $5,000, offered in evidence, which expired on the

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13th of October 1852, and was renewed by the said Daugherty or the defendant;—and even though the jury should believe that at the 2d of December, 1852, the said firm of Stanbrough, Holliday & Company assigned its interest under said insurances of $1,000 each, (of which assignment notice was given to the insurers on the 18th of January, 1853,) to secure the indebtedness mentioned in the deed of trust aforesaid, and even though the jury shall believe that the said Mark A. Duke asserted to the assumption by the firm of Stanbrough, Holliday & Company, of the indebtedness to the firm of Stanbrough & Holliday to the defendant.

Plaintiffs' 2nd Prayer.—That if the jury believe from the evidence that Stanbrough & Holliday were partners as set forth in the plaintiffs' first prayer, and that Mark A. Duke subsequently became a partner with them under the new firm of Stanbrough, Holliday & Company, in carrying on the same business as the old firm, and that articles of co-partnership in writing were entered into between the members of the new firm as testified by the witness, John R. Holliday, on or about the 1st of January, 1852, and that the subject of the assumption of the liabilities to the defendant of the old by the new firm, was spoken of among the members of the latter, at and before the execution of said articles, then in the absence of any thing in said articles on the subject of such assumption, oral testimony is inadmissible to prove the same to have been one of the considerations of the new partnership.

Plaintiffs' 3rd Prayer.—That if the jury should believe from the evidence that such assumption was in fact agreed upon after the formation of the partnership, it cannot prejudice the plaintiffs in the absence, should the jury find such absence, of any consideration to be proved to and found by the jury moving from defendants to the said new firm.

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And that the payment of any of the notes due to said defendant and mentioned in the plaintiffs' first prayer, were with the assent of Mark A. Duke, is not sufficient to create a binding obligation on the new firm to pay the whole or any of said notes remaining unpaid.

And the defendant prayed the Court to instruct the jury as follows:

Defendant's 1st Prayer.—If the jury shall find from the evidence that James Giddings, the defendant, was the owner of the cotton machinery referred to in the evidence, and that he sold and delivered the same to Stanbrough & Holliday upon a credit, and that in order to secure the payment of the purchase money, they executed to William F. Daugherty, the deed of trust, dated 31st of March, 1851, offered in evidence by the defendant, and that they afterwards took into business with them Mark A. Duke, and transacted their business under the firm of Stanbrough, Holliday & Company, and that said firm agreed among themselves with the knowledge and assent of the defendant, Giddings, that they would take the said cotton machinery subject to its liabilities to Giddings, under said deed of trust, and would pay the debt therefor to the said Giddings, and did in fact pay part thereof, and that the said Stanbrough, Holliday & Company did then insure the said property which was afterwards, to wit: on the 19th of November, 1851, destroyed by fire, and the insurance companies made liable therefor, then by the true construction of the said deed of trust, and the facts so found by them as above, the defendant Giddings is entitled to said insurance money, and under the agreement in this cause their verdict must be for him notwithstanding they may also find that subsequent to said loss by fire, the said Stanbrough, Holliday & Co. executed and delivered to the plaintiffs the papers offered in evidence by the plaintiffs, designated as assignments Nos. 1, 2, and 3.

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Defendant's 2nd Prayer.—If the jury shall find the facts stated in the defendant's first prayer, and shall also find that on the second day of December, 1851, the firm of Stanbrough, Holliday & Co. executed and delivered to William F. Daugherty, the assignment offered in evidence by the defendant, which was certified to said insurance company on the 19th of January, 1853, then the plaintiffs are not entitled to recover.

Whereupon the Court (LEE, J.,) granted the plaintiffs' prayers, and refused to grant the defendant's prayers, to which granting of the plaintiffs' prayers and refusal to grant the defendant's prayers, the defendant excepted, and the verdict and judgment being for the plaintiffs, appealed.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, and WEISEL, J.

George W. Dobbin and *George L. Dobbin* for the appellant.

The appellant, the defendant below, now maintains that by the true construction of the deed of trust from Stanbrough & Holliday, to Daugherty, the insurance to be made by the former was for the benefit of Giddings, the appellant, and gave to him a lien on the proceeds of the insurance; and that when Duke was introduced into the firm with knowledge of this obligation to insure for the benefit of Giddings, he became as much bound to the duty of insuring, and the proceeds of such insurance as much subject to Giddings' lien, as in the case of the firm of Stanbrough & Holliday.

That it was not within the competency of either the old firm, or the new, to assign the proceeds of insurance to any general creditors of the old or the new firm, to the prejudice of Giddings' lien, who was a particular creditor, having a lien upon the fund.

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In support of these propositions, reliance will be placed on the case of *Thomas' Admrs. vs. Von Kapff's Executors*, 6 *G. & J.*, 372, which it will be contended decides all the principles involved in this case.

That Seevers was not a purchaser for a valuable consideration. See *Jones vs. Hardesty*, 10 *G. & J.*, 410, and p. 378 of the case above referred to, in 6 *G. & J.*

John H. B. Latrobe and *J. J. Snyder* for the appellees.

The articles of co-partnership of the new firm make no mention whatever of any antecedent firm, or any of its liabilities or obligations. On such proof as this, the trustee of the old firm could have no claim, legal or equitable, to the insurance of the new firm. Hence the introduction of Mr. Holliday's testimony is fairly questionable on several grounds:

1. If there was the prior consultation and explanations with Duke, of which the witness speaks, the written agreement subsequently entered into, must be taken as the ultimate conclusion of the parties, to the exclusion of all that may have gone before which is not mentioned in it.

2. If the agreement, the articles of co-partnership, was entered into first, and the consultations and explanations took place afterwards, they are clearly incompetent to vary one tittle what the parties have expressed in writing.

3. If not relied on to enlarge or construe the articles of co-partnership, but as independent undertakings on the part of Duke, there is no evidence of any consideration to sustain them.

4. They are, however, not even relied on by Ira Stanbrough and John R. Holliday themselves, who, in their assignment of the insurance money of the 2d December, 1852, put the claim of Giddings, not on the undertakings of Duke, manifested by his interviews with Holliday, but upon their "belief that the said Giddings is entitled to the

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same by reason of the said deed of trust," to wit: the deed of trust of the old firm, of March 31st, 1851.

We are authorized, therefore, to reject the testimony of Holliday, not only on the first three of the above legal propositions, which are too clear to require authority to be cited to support them, but upon the very assignment under which the appellant claims.

This, then, leaves but one question open, which is, the effect of the deed of March 31st, 1852, to Daugherty, upon the policies taken out by the new firm. The deed of trust itself provided for the failure of the old firm to insure without any reference to any insurance to be effected by the new one, which last, unquestionably, was not contemplated when the deed of trust was executed, in March, 1851, the new firm being formed in January, 1852. The deed of trust required the trustee to sell, in the event of a failure to insure, and if the *cestui que trust*, the appellant, allowed the property to remain without insurance after the 13th October, 1852, and he has lost by it, he cannot complain, nor can he claim the benefit of an insurance made by a different firm from that which he trusted—an insurance which was in all probability intended as a means of obtaining credit for carrying on the business of the new firm, and was ultimately used in the payment of its obligations.

But even admitting that the deed of the 31st of March gave to the appellant certain equitable claims, which justified what has been done to put the trustee into the legal possession of them—in other words, that they did not pass by the deed of March 31st, 1852, but required for their transfer some more authentic act; we contend that the attempt which was made on the 2d December, 1852, by Ira Stanbrough and John R. Holliday, as "acting partners" of the firm of Stanbrough, Holliday & Co., was totally ineffectual to pass any title to the trustee which he could transfer to the appellant.

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1. In the first place, there is no evidence that the new partnership was dissolved before it expired by limitation in 1853. On the contrary, Mark A. Duke was an acting partner when he gave the original order to the appellees on the 20th November, 1852, prior to the date of the deed of the so-called "acting partners;" and again, on the 10th of December, when he gave the duplicate order, after the deed aforesaid.

2. In the next place, it is well settled law, now-a-days, that while there are circumstances under which one partner may bind another by deed, yet he can never do so without his consent or against his will; there must, in all such cases, be a previous consent or a subsequent ratification. 1 *Hall Sup. Court, City of New York*, 270. *Collyer on Partnership*, 394. And here the acts of Duke, the partner sought to be bound by his co-partners, in assigning the policy in question to the appellees, both before and after the deed under seal of Stanbrough & Holliday, shew conclusively that there was neither previous consent nor subsequent ratification, nor is there any evidence to show that any custom existed in this particular firm, which justified the attempt to convey, by deed, to which we refer.

The attempt, therefore, was a nullity, and no title passed to the trustee on the 2d December, 1852. The deed was not necessary to pass the "insurance money," though it may have been thought to be necessary to pass the policy, on account of the latter being an instrument under seal. But the policy was burnt. The claim was for a sum of money for which *assumpsit* could have been brought. It required no deed to pass it, and the use of a deed has only served to demonstrate what the simple use of the partnership name would have rendered difficult. Thus the act was done, not by the firm with the implied assent of all the members, but by two of the partners in opposition to the other.

Besides, even in those cases where a partner may bind

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his co-partners by a sealed instrument, it is the seal of the firm that must be used, not, as here, the seals of the individuals. *Collyer on Partnership*, and cases referred to. *Story on Partnership.*

But, while we have argued the case in view of the points raised in the Court below, and now apparent on the record, we still insist that the assignment to the appellees, in the course of business and for a valuable consideration, and without notice of any outstanding equities as between the partners or others, if any such existed, was valid and should be sustained.

In the Court below much reliance was placed on the case of *Thomas' Admrs. vs. Von Kapff's Admr.*, 6 *G. & J.*, 372. We regard this case as conclusive against the appellant. There, was a covenant to keep mortgaged property insured for the benefit of the mortgagee; the premises were burnt; the administrators of the mortgagor received the insurance money; the mortgagees' executors claimed it from them; the sale of the burnt property not producing enough to pay the debt, the question was one between the parties themselves. Strangers had nothing to do with it, and the Court gave the insurance money to the mortgagee. Certainly it could not have done otherwise. But here the question is not between the parties cognizant of all the facts and bound by all the obligations of the instrument; here the contest is between the mortgagee and a third party—a stranger—a purchaser for a valuable consideration without notice.

Assuming the theory of the appellant even, that the deed of March 31st, 1852, covered the insurance by the new firm, Duke, who made the assignment to the appellees in the firm's name, as he had a right to do, so far as to give title to parties who had no notice of what might have restrained him, and who gave value for what they received, passed a

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title to the assignees which we respectfully insist should be sustained.

GOLDSBOROUGH, J., delivered the opinion of this Court.

The appellant was the owner of certain cotton machinery in the Valley Factory, at Harper's Ferry, in Virginia. This machinery he sold to the firm of Stanbrough & Holliday, on a credit, and took their notes for the purchase money, to secure the payment of which they executed a deed of trust on the 31st day of March, 1851, to William T. Daugherty, in which they agreed to insure the said property to the amount of the debts secured by the deed, in some responsible office. All of the debts thus secured were paid except two notes to the appellant, one for $2,000, and the other for $1,124.

In pursuance of the agreement to insure, Stanbrough & Holliday effected an insurance in the Etna Insurance Company for $5,000; $1,500 on fixed machinery, and $3,500 on movable machinery, loss payable to James Giddings. This insurance was for one year, from the 12th day of October, 1850, to the 12th day of October, 1851, and renewed to 12th October, 1852, when it expired.

The firm of Stanbrough & Holliday continued until the 15th day of January, 1852, when Mark A. Duke became a member thereof, under the name of Stanbrough, Holliday & Co., and the firm thus constituted effected two policies of insurance, for $1,000 each; one in the Etna Insurance Company, and the other in the Protection Insurance Company, both policies embracing the movable machinery in the Valley Factory, and admitted to be the same machinery covered by the first policy, in which it was provided that in the event of loss, the loss was to be payable to the appellant. The two policies, for $1,000 each, were taken out on the 20th of January, 1852, for one year, to the 20th of January, 1853.

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On the 3d of August, 1852, Mark A. Duke, one of the new firm, made a purchase of cotton, for the use of the factory, from the appellees, and gave to them a note for $282.47, signed in the name of the firm, and on the 1st of November, 1852, executed another note, payable to the appellees, for $1,253.94. This last note being "a note on which the plaintiffs put their names for a commission paid to them by Stanbrough, Holliday & Co., which last note was paid at maturity by the plaintiffs."

The policy for $5,000 in the name of Stanbrough & Holliday, was transferred on the 24th of January, 1852, to the name of Stanbrough, Holliday & Co. The property was destroyed by fire on the 19th of November, 1852, after the expiration of the policy of $5,000 to Stanbrough & Holliday.

On the 20th of November, 1852, Duke, signing the name of the new firm, gave to the appellees an assignment of each of the $1,000 policies, and afterwards, on the 10th of December, 1852, from some apparent apprehension that the first assignments were not in proper form, he gave them a new assignment of the policies, of which assignments the assignees gave notice to the insurance companies.

On the 2d of December, 1852, Ira Stanbrough and John R. Holliday, describing themselves as the acting partners of the firm, assigned the money due on the $1,000 policies to William T. Daugherty, trustee in the deed of trust, for the benefit of the appellant; and on the 18th of January, 1853, Daugherty assigned the said money to the appellant.

The $2,000 was subsequently paid by the insurance companies to Messrs. Dobbin and Snyder, the counsel of the appellant and appellees, and by them invested for the benefit of the party who might be entitled to it. That the legal right to this fund might be judicially determined, it

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"was agreed that a case should be docketed in the Superior Court of Baltimore City to September Term, 1854, and a *nar* with the common Courts in *assumpsit* be filed with a plea of *non-assumpsit*, and all errors in pleading waived, and that the plaintiffs and defendant may give in evidence the assignments executed to them, respectively, by Stanbrough, Holliday & Co., and that this case shall determine which is entitled to the fund in the hands of the counsel. If it be determined for the plaintiffs, to the extent of the judgment if the fund be sufficient, said fund shall be paid to the plaintiffs, and if for the defendant, in like manner to the defendant."

At the trial of the cause, after the deed of trust, the policies of insurance, assignments, and other instruments of writing, which it was agreed should be admitted in evidence, were submitted to the jury.

John R. Holliday, one of the firm, was produced as a witness for the defendant, and testified that it was understood and agreed between all the members of the new firm, before, at, and after the formation of the co-partnership, that the new firm was to come under all the liabilities of the old firm to James Giddings, in relation to the mortgaged machinery, as the same were embodied in the deed of trust to Mr. Giddings, and that the covenant for insurance was expressly recognized as being among said liabilities, and that the new firm did afterwards pay a part of the debt to Giddings, the said Stanbrough, Holliday and Duke uniting in the signature of their separate names for the balance of the note then settled. The witness further testified that he saw Duke several times at Harper's Ferry, and fully explained to him the liabilities in regard to the insurance, as well for the benefit of Mr. Giddings, as also other insurance for the benefit of the landlord or owner of the mill.

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After all the evidence had been submitted to the jury, and before they retired, the plaintiffs offered three prayers and the defendant two prayers. Those of the plaintiffs were granted by the Court, and the defendant's rejected.

The jury, under the instructions of the Court, found a verdict for the plaintiffs for $2,132,81, upon which judgment was entered, with interest from the 3d day of August, 1859. The defendant excepted to the ruling of the Court, and appealed. After the transmission of the record in this case, the following agreement was filed in this Court on the 20th of October, 1865:

"This suit having been originally instituted to try the respective rights of James Giddings, on the one hand, and A. F. and W. R. Seevers, on the other, to a fund in the hands of George W. Dobbin and J. T. Snyder, (and invested by them in City of Baltimore 6 per cent. stock,) it is agreed that if the Court of Appeals shall affirm the judgment of the Superior Court on this appeal, such judgment shall affect only said fund, except as to costs of suit; and if the said Court of Appeals shall reverse said judgment of the Superior Court, then they shall enter judgment for the said James Giddings for the amount of his debt and interest, as shown by the record; said judgment to affect only the said funds in hand, as above mentioned, except as to costs, for which, in any event, the losing party is to be personally liable."

In view of the above agreement, we have carefully considered this case, and are of opinion that the ruling of the Superior Court in granting the plaintiffs' prayers, and rejecting those of the defendant, was erroneous, and the judgment must be reversed. The agreement contained in the deed of trust to insure for the benefit of the appellant, secured to him the proceeds of any insurance when effected; and when Duke became a member of the firm, with full knowledge of the agreement and obligation to insure for

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the appellant's benefit, any insurance effected by the new firm was equally affected by the appellant's lien, and Duke could not divert it from this purpose. The appellees must be regarded as general creditors, and not as purchasers of the two policies for a valuable consideration.

The appellant did not trust to the personal credit of the firm alone, but relied also on the insurance for the satisfaction of his claim. The agreement to insure was expressly for his benefit, and not for the benefit of general creditors. The appellees, as general creditors, trusted to the personal credit of the firm alone, and if the assignment of the insurance to the appellees be sanctioned, they derive advantage from a fund which they did not look to, and to that extent take from the appellant that on which he specially relied. See *Thomas' Admr. vs. Von Kapff's Excrs.*, 10 *G. & J.*, 372.

In the case of *Jones vs. Hardesty and others*, 6 *G. & J.*, 420, this Court said: "He who takes an assignment of a *chose in action*, not negotiable, takes it subject to all the legal and equitable defences of the obligor or debtor, to which it was subject in the hands of the assignor. If he accepts the assignment in ignorance of their existence, without using the appropriate means of acquiring a knowledge of them, the consequences are the merited result of his negligence." In this case, the deed of trust containing the agreement to insure, was on record and open to public inspection.

The judgment of the Superior Court is reversed, with costs, and judgment rendered for the appellant for $3,124, with interest from the 3d day of May, 1850. This judgment to affect only the fund in the hands of George W. Dobbin and J. T. Snyder, according to the last agreement filed in this cause.

Judgment reversed with costs.

(Decided December 18th, 1865.)

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JAMES S. MORSELL, JR., AND NATHANIEL DUKE, NEXT FRIEND OF SARAH B. D. MORSELL *vs.* JOHN J. OGDEN, NEXT FRIEND OF ELIZABETH R. MORSELL.

LAST WILL AND TESTAMENT, UNEXECUTED, WHEN NOT TO BE ADMITTED TO PROBATE.—E. M. having caused to be prepared in writing her last will and testament, declared herself fully satisfied therewith, but failed to execute the same for nearly one year thereafter, when, desiring to execute it, but not being able to find it, she directed her brother Q. A. M. to have a second will prepared similar to the first. A second will was prepared, but E. M. died without having executed it. The second will having been offered for probate, a caveat was filed thereto the same day. It was proved by the attorney who prepared both of said wills that the second was in substance the same as the first; but it appeared that it was never in her possession; that she neither read it nor heard it read; that she made no inquiry in reference to it during her last illness, and there was no evidence to show that the deceased was unavoidably prevented from executing it, or that she intended it to have effect in its imperfect state. On appeal from an order of the Orphan's Court admitting the second will to probate, HELD:

That the state of the evidence leaves it in doubt whether the "*animus testandi*" manifested at one time by the deceased continued with her to the time of her decease, or during her testamentary capacity, after the preparation of the paper, and that the Orphans' Court was in error in admitting the proposed will to probate.

APPEAL from the Orphans' Court of Calvert County.

This is an appeal from an order of the Orphans' Court of Calvert County, admitting to probate an unexecuted writing, purporting to be the last will and testament of Eliza Morsell, deceased.

The facts of the case are stated in the opinion of this Court.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

C. S. Parran and *D. R. Magruder* for the appellants.

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The appellants contend that the Orphans' Court erred in admitting this unexecuted paper to probate, because:

1st. The paper being unexecuted there is no evidence to show that the deceased was unavoidably prevented from executing it, or that she intended it to have effect in its unfinished state. *Boofter vs. Rogers*, 9 *Gill*, 53. *Plater vs. Groom*, 3 *Md. Rep.*, 142. *Barnes vs. Syester*, 14 *Md. Rep.*, 527. *Modern Probate of Wills*, 56. *Weems vs. Weems*, 19 *Md. Rep.*, 343. *Tilghman vs. Steuart*, 4 *H. & J.*, 156. *Brown vs. Tilden*, 5 *H. & J.*, 371.

2nd. The will purports to dispose of both real and personal estate, and being known to the decased to be incomplete as to the one, it cannot be supposed to have been intended to operate as to the other. *Plater vs. Groom*, 3 *Md. Rep.*, 142. *Tilghman vs. Steuart*, 4 *H. & J.*, 173.

3rd. The paper propounded for probate was never seen by the deceased, and the purport of the instructions given by her for the preparation of her will is not clearly shown; and it does not appear that ordinary efforts were made by the deceased to have the paper procured and executed, though she had ample opportunity of doing so.

4th. It is not shown that the paper offered for probate conforms to the instructions given by the deceased, or that her intentions as to the disposition of her property are clearly expressed therein.

5th. The instructions given by the deceased amounted to nothing more than a mere project for a will, never considered by the deceased as finally settled or concluded.

Henry Williams and *A. B. Hagner* for the appellee.

It is insisted by the appellee that the ruling of the Orphans' Court should be sustained upon the principle decided in the cases of *Weems vs. Weems*, 19 *Md. Rep.*, 334. *Brown vs. Tilden*, 5 *H. & J.*, 371. *Visitors, &c.*,

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vs. Bruce, 1 *H. & McH.*, 509. *Boofter vs. Rogers*, 9 *Gill*, 53.

GOLDSBOROUGH, J., delivered the opinion of this Court.

The appeal in this case is taken from a decree of the Orphans' Court of Calvert County, by which the paper writing set out in the record, marked A, and purporting to be the last will and testament of Eliza Morsell, was admitted to probate.

The objections urged by the caveators to the admission of this paper writing to probate are, that it "was not executed by Eliza Morsell in her life time in due form of law, as and for her last will and testament, nor by her intended and declared as and for her last will and testament."

The caveatee, by his answer, does not deny the allegation of the caveators as to the non-execution of the paper writing, but says "that the said paper was intended as and for her last will and testament by said Eliza Morsell, and that the same is sufficient to convey the personal property of the said deceased."

The provisions of the paper writing, marked A, are very brief, and may be concisely stated:

The testatrix gives and devises to her brother, Quincy A. Morsell, certain enumerated slaves, together with all her property, real, personal and mixed, of which she might die seized and possessed, or in any way entitled to, during his natural life, in trust for the separate use of her niece, Elizabeth R. Morsell, daughter of said Quincy A. Morsell, he to have the management and control thereof, and to appropriate the income from the property towards the education, support and maintenance of said Elizabeth; and after the said Quincy's death the whole property is bequeathed to Elizabeth, absolutely to her and her heirs,

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to hold the same without the intervention of a trustee; and Quincy A. Morsell is appointed sole executor.

The paper writing under consideration is not signed by Miss Morsell, nor are the blanks filled up; and though there is an attestation clause, no witness signed it. She never saw it, but it was found in the possession of Mr. Williams the attorney who prepared it, and produced by him after the death of Miss Morsell.

We are therefore left to determine, from the evidence presented in the record, whether a paper thus offered for probate is sufficient in law to convey personal property as contended for by the appellee.

Mr. Williams, who prepared the paper, testifies that in the summer of 1862 he was called on by Mr. Quincy A. Morsell to prepare a will for his sister, Miss Eliza Morsell, leaving all of her property to her brother, the said Quincy, during his life, in trust for his child Betty, and appointing him executor.

Miss Lizzy Gamber testified that she resided in the house with Miss Eliza Morsell from June, 1863, to the 5th of January, 1864, when she died. That about twelve days before her death Miss Morsell told witness that Mr. Henry Williams had prepared a will for her, but it had not been signed, and she was prevented by paralysis from executing it, and it was afterwards lost. That she at one time had a will prepared leaving all her property to her niece, Betty Morsell, child of her brother Quincy.

Mr. Williams further testified that about four weeks before the death of Miss Morsell, Quincy A. Morsell gave him instructions to prepare a will similar to the first, which he did in about a week after receiving instructions. That he had not retained a copy of the first will, and prepared the second from two forms which he used in the preparation of the first, and that the second will, although not identical in language, was in effect the same. That

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he never had any conversation with the said Eliza on the subject of making her will, and never received any instructions directly from her, and does not think he ever saw her after receiving instructions from Quincy Morsell. After the second instructions were given he was not called on for the will which he had prepared, and received no message about it. That the paper filed in this cause, marked A, is the paper that he prepared according to the instructions received from Quincy A. Morsell the second time.

Miss Gamber further testified that Miss Morsell said she had instructed her brother Quincy to get Mr. Williams to prepare a second will like the first; that this conversation took place a week before her death; that it was in the spring of 1863 she discovered that the will which had been prepared by Mr. Williams was lost; that she approved of the first will which was lost; that about a week before she died she told the witness she had read the first will and approved of it. During her last illness she made no allusion to any will, and witness never heard deceased speak of having any executed will in existence; that Miss Morsell's last illness continued from the Thursday on which she was taken sick until the following Tuesday week, on which latter day she died; that witness was with her during the time of her last illness, and never heard her send for the will which Mr. Williams was to prepare, nor did she make any effort to get it.

There is nothing in the evidence in this case to show that Miss Morsell intended that the paper should operate in its unfinished and imperfect state as her will. She did not write it; it was not in her possession at any time; she neither read it nor heard it read, and there is no evidence that she approved or adopted it; nor was she prevented from executing it by any casualty which the law denomi-

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nates an act of God. She had full time after the paper was prepared for her to obtain and execute it. Her failure to do so leaves the Court in doubt as to her intentions. We are certainly not satisfied from this state of the proof that the *animus testandi*, which she manifested at one time, continued with her to the time of her decease or during her testamentary capacity after the preparation of the paper.

The general principles must govern in such cases. They are clearly stated (as deduced from all the cases) by Justices MARTIN and BUCHANAN, in *Tilghman vs. Stewart*, 4 *H. & J.*, 166, 167, 173, 174 *and* 176; and fully recognized and adopted in *Plater vs. Groome*, 3 *Md. Rep.*, 143; in *Boofter vs. Rogers*, 9 *Gill*, 53, 55, and in *Weems vs. Weems*, 19 *Md. Rep.*, 349, 350. In the last named case the instructions for the preparation of the will were given by the testator in the morning; the paper propounded as the will was drawn in accordance with the instructions given, and was executed by him on the evening of the same day. In the interval his testamentary capacity, which was proved to exist when the instructions were given, had left him before the hour of the execution of the paper. All this occurred on the same day, and in accordance with the like case of *Barnes vs. Crouch*, referred to in *Dorsey's Test. Law*, the will was allowed to take effect. The party was deprived of intellect in each of the cases before he could reasonably have had time to execute the paper after it had been prepared for the purpose. He was, therefore, prevented by the act of God from carrying out a testamentary purpose, for the formal execution of which the preparation had been made, but not in time to complete it. Entertaining the opinion that the decree of the Orphans' Court is erroneous, we will sign a decree of reversal, and remand the cause

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for further proceedings. The costs to be paid out of the estate.

Decree reversed and cause remanded.

(Decided January 10th, 1866.)

Townsend Barber et al. *vs.* State, use of Mary M. Haller.

Bastardy: Scire Facias: Recognizance, &c: Receipt of Mother—How far a Discharge of the Obligations of the Putative Father.—In a proceeding under the Code, Article 13, Section 7, &c., in relation to bastardy, until the recognizance has been given and the order of the Justice has been passed thereon, fixing the sum to be paid by the putative father for the maintenance of the child, the mother of the child may accept from him any sum she may consider adequate compensation for its past maintenance; and if paid in good faith he would be discharged from his obligation for the period embraced in the settlement.

——: ——: Receipt of the Mother Inoperative to Discharge the Putative Father from Liability for the Future Maintenance of the Child.—Where a receipt for money paid as above, in terms purports to discharge the putative father from liability for the future maintenance of the child, in that respect it would be wholly inoperative, as plainly against the policy of the law.

Recognizance, Object of it: Conusor not Relieved from Obligation to the County by Agreement with Others.—The recognizance creates an obligation to indemnify the county by providing security for the maintenance of the child, from which the conusor cannot relieve himself by any agreement he may make with other persons.

Pleading: Demurrer: Practice: Judgment Final—Erroneous entry of: Procedendo.—The defendant pleaded seven pleas to the *scire facias*, to the 1st, 2nd, 3rd, 4th and 6th of which the plaintiff demurred, and traversed the 5th and 7th. The Court below ruled in favor of the plaintiff on the demurrers, and thereupon rendered final judgment against the defendants, while it does not appear that the 5th and 7th pleas were withdrawn or abandoned, and the issues of fact thereon were not tried or determined. On appeal, Held:

That the final judgment was erroneously entered and must be reversed and the cause remanded upon *procedendo*.

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Barber et al. *vs.* State use of Haller.

APPEAL from the Circuit Court for Frederick County.

This is an appeal from a judgment in the matter of a *scire facias* issued from the Circuit Court for Frederick County, upon a recognizance in a case of bastardy. It appears from the record that Mary Haller, after having the sole custody and expense of the child in reference to which this case originates, from its birth, April 20th, 1859, to February 27th, 1864, nearly five years, on the day last named, made complaint against the father, the defendant, before a Justice of the Peace; that the defendant appeared and entered into the usual recognizance to indemnify the county for the support of the child, and then immediately after, by agreement with said Mary Haller, paid her $20, "in full satisfaction of all expenses that have been incurred or may accrue in the maintenance of said child;" that the said Mary M. Haller accepted the money and executed a full receipt and release to the effect recited, which receipt is admitted in its full force and filed in the cause.

In October following, eight months after the payment of said sum of money and delivery of the said receipt, the said Mary M. Haller, still retaining the custody and providing for the support of the child, applied to a Justice of the Peace for an order, under said recognizance, against said defendant, for the payment of an adequate compensation for the support of said child for the entire five years that have elapsed from its birth up to the intermediate April. The Justice thereupon, as he himself recites, "on the oath of said Mary M. Haller," issued an order, "requiring the defendant to pay the sum of $150—less $20—as an adequate compensation for the support of the child for said five years," &c.

The defendant not obeying said order, *sci. fa.* was issued on said recognizance, from the Circuit Court of Frederick county, as it states "for the use of said Mary M. Haller,"

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and at the trial thereunder, on the proceedings and facts which appear in the record, judgment of *fiat* was entered against the defendant for $130;—being the extreme limit of $30 *per annum* for the said five years, after deducting the $20, which was paid as in full satisfaction of all said Mary M. Haller's expenditures for the child. From this judgment the defendant has appealed.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

O. Miller for the appellant.

As preliminary to the main point in issue, but still pressed as material, the appellant under his second plea submits, that the language of the Justice's order, "requiring the defendant to pay the sum of $150—less $20—as an adequate compensation," &c., is not sufficiently expressed and certain. The specific amount here required to be paid, must be matter of inference, determinable by the defendant's own construction of language and calculation.

As to the defendant's plea that there has been no damnification of the county in this case, the technical damnification the county suffers whenever an illegitimate child is born, is not meant to be denied, but that substantial damnification which the proceedings in bastardy contemplate, and are instituted to prevent. And in this connection we rely on the settled law, that the person who has the custody of the child stands in the place of and for the county, as to the fruits of the recognizance, and consequently during such custodianship, the indemnification of the former is the indemnification of the latter. In other words, the custodian cannot be saved harmless, and the county at one and same time be damnified.

The remaining and principal inquiry in the case is,

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whether Mary M. Haller, the custodian, was competent to estimate her charge and maintenance, past and prospective, of the child,—the child in fact continuing in her custody during both past and future periods,—and accept a sum in satisfaction and reimbursement of her outlay? And if she could not so estimate and agree as to her prospective custodianship, could she not at least do so in regard to the period of custody and maintenance already transpired?

We believe the propositions involved in both branches of the inquiry to be tenable; but it is sufficient for our purpose, if the latter inquiry receive an affirmative answer.

Now it is not contended that Mary M. Haller, by any act of hers, could release and annul the recognizance itself during the period of the seven years which it covers; it must of course remain for the indemnification of the county, or its representative, till it has accomplished its object of securing the support of the child from year to year till it arrives at the age of seven years; and, undoubtedly, could be resorted to by any other or future custodian of the child within that period. What we maintain is simply this, that a person having had the sole custody and maintenance of a bastard child, may for that period of custody and maintenance already elapsed, estimate the outlay and trouble incurred, and receive a sum as an equivalent and reimbursement therefor, and especially after bond entered into,—and is estopped from further recourse to the bond for that period once so satisfied. We know of no authority bearing directly on this point, though *Grantz vs. State*, 4 *H. & J.*, 121, may be referred to; but it seems to us the proposition must be conceded.

It is admitted that the recognizance is part of a criminal proceeding, and therefore penal in nature; but what is its penal operation to enforce? Not, we submit, the

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payment annually of a given, fixed sum of money, but "to indemnify the county from any charges that may accrue from the maintenance of said child," or, as amplified in the section of the Act providing for the Justice's order, "to secure the payment to the mother, or other person having the custody of said child, such a sum of money as may appear adequate for the maintenance of such child, not exceeding thirty dollars *per annum*, until said child shall arrive at the age of seven years;" the said sum of thirty dollars not being mentioned as the sum precisely necessary for the yearly support, but as a limitation within which the true sum may be found. The payment, therefore, of any sum within the thirty dollars *per annum* "adequate for the maintenance of the child," to the party having its custody, meets and exhausts, for the time so paid for, the requirement of the bond. According to *Mong vs. State*, 10 *G. & J.*, 383, "the object of the *scire facias* is to reimburse the custodian for his expenditures."

What is an "adequate sum," then, may be any sum not exceeding thirty dollars *per annum;* but no fixed or invariable sum is prescribed by the law. It will obviously be affected by the varying circumstances of locality, cost of sustenance, character of support, &c., and of necessity must be matter of inquiry and proof.

Now the issuing of the Justice's order of payment is obviously throughout an *ex-parte* proceeding, being a matter of course, on *prima facie* evidence of the custodian's oath that less than thirty dollars *per annum* has been received, and on such evidence as the Justice may take, without the required presence of the father, as to the amount still required as adequate for the support of the child within the said thirty dollars *per annum*. The protection of the father against this order, if not warranted by the facts, is secured on the return of the *sci. fa.*, which operates as an

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appeal therefrom, to the Circuit Court, and when according to the 8th section of the Article on bastardy in the Code, "such proceedings shall be had as shall bring the matter in dispute fairly to trial." Then we submit, the father may show either that he has in fact paid the thirty dollars *per annum*, all that can possibly be required, if even insufficient for the support of the child, or such sum within that limit as was in fact adequate for its maintenance, which is the true sum to be demanded.

Now, before the Justice there was no evidence taken on which the order was issued, but the "oath of said Mary M. Haller," as the order recites, that she had not received as much as thirty dollars *per annum*, and no evidence, so far as we are advised by the record or otherwise, as to what was "an adequate sum for the support" of this particular child.

But, at all events, when "the matter in dispute" came up for revision in the Circuit Court on the *sci. fa.*, there was no evidence adduced or offered bearing upon the question of adequacy of support, but the admitted receipt aforesaid of said Mary M. Haller, given *bona fide*, and with no allegation of fraud, at least against appellant, in which she, the party for whose "use" the *sci. fa.* was issued, who had the child for the whole period in question, and alone knew her outlay and expenditures, set her estimate and valuation on the same at twenty dollars, and accepted it in satisfaction, settlement and reimbursement thereof.

I. Nevett Steele and *W. B. Nelson*, for the appellee.

Two questions arise upon the record in this case.

1st. Was it competent for the parties in this case to compromise the same and thereby oust the criminal jurisdiction of the Courts?

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2nd. Admitting the power to compromise, is the payment to the appellee, Mary M. Haller, of the sum of twenty dollars, by the appellant, Barber, a satisfaction of the maintenance due under the recognizance?

Upon the first proposition it has been repeatedly decided by this Court that the proceedings under the Bastardy Acts are criminal proceedings, and that they are not authorized for indemnity to the county alone, but that the principal objects and purposes of said laws are to punish fornication. If such be the law then it is evident that the law will not sanction any such agreements or compromises. *State vs. Phelps*, 9 *Md. Rep.*, 21. *Owens vs. the State*, 10 *Md. Rep.*, 164. *Acts of* 1781, *ch.* 13.

But admitting that the appellant and appellee had the right to settle and compromise this case, it must be upon the assumption that, at the time of such settlement or compromise, there was a legal subsisting debt due by the appellant to the appellee; then, at such time there was due, under the recognizance from appellant to appellee four years' maintenance of the child, and the amount as fixed by the order of the Justice of the Peace in this case, being the sum of thirty dollars *per annum*, the appellant was indebted to the appellee in the sum of one hundred and twenty dollars. There being no release from the appellee, but only a receipt, not under seal, there was no consideration for the release of the difference between twenty dollars, the sum paid, and one hundred and twenty dollars the amount due by the appellant to the appellee. The principle is well settled, that the payment of a less sum of money than the whole debt, without a release, is not satisfaction of the plaintiff's claim. *Geisor vs. Kershour*, 4 *G. & J.*, 305.

The order of the Justice of the Peace is sufficiently certain, the order being for a sum certain, to wit, $150 less $20. *Id certum est, quod certum reddi potest.* Upon these propositions we submit that the appellee is clearly entitled

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to recovery of the judgment awarded her by the Circuit Court of Frederick county.

BARTOL, J., delivered the opinion of this Court.

The main question argued by the counsel in this case, and one upon which its ultimate decision must in a great measure depend, is the legal operation and effect of the *receipt* of the 29th of February, 1864, given by Mary Haller to Townsend Barber.

We shall therefore proceed to express our opinion upon this question, without referring at this time, particularly, to the form of the pleadings, or the manner in which the question is presented by the record.

It is very clear to us that if the order of the Justice of the Peace had been previously passed, fixing the sum to be paid for the maintenance of the child at thirty dollars *per annum*, a mere receipt for the sum of twenty dollars, although on its face purporting to be in full, would not discharge the conusors.

It has been settled by many cases "that the payment of a less sum of money than the whole debt, without a release, is no satisfaction of the plaintiff's claim." *Jones vs. Ricketts*, 7 *Md. Rep.*, 108. 4 *G. & J.*, 305. 5 *Gill*, 189. 15 *Md. Rep.*, 569.

But that is not the question here presented. Nearly five years had elapsed after the birth of the child, before any complaint was made by the mother, or any recognizance required; during that time the child had remained in her custody.

One of the objects of the recognizance being to secure to the custodian of the child a sum to reimburse her for her expenditures in its maintenance, (10 *G. & J.*, 383,) when executed it would of course relate back to the birth of the child, and under it might be recovered for such expenditures as had been incurred before its date, a sum not ex-

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ceeding thirty dollars a year, to be ascertained by the order of the Justice. See *Eccleston vs. The State*, 7 *G. & J.*, 316.

But in such case, if the question were properly presented it would seem, the amount to be recovered in any one action could not exceed the sum of eighty dollars, that being the whole amount of the recognizance.

Here the question is whether the mother or other custodian of the child may not, before any order is passed by the Justice fixing the sum, receive any amount less than thirty dollars a year as a full compensation for the maintenance of the child during the time which had elapsed, and whether her receipt therefor will not operate as a discharge? If done *bona fide* and without any fraud or deception we think such would be its effect.

Until the recognizance has been given, and the order of the Justice has been passed thereon, fixing the sum to be paid, it cannot be said that there is any certain ascertained sum due by the putative father of the child. The code does not prescribe the sum to be paid, but leaves it to be fixed by the order of the Justice, not to exceed thirty dollars per annum. Until such order is passed, there can be no reason why the custodian of the child may not accept from the putative father any sum she may consider adequate compensation for its past maintenance, and if paid in good faith he would be discharged from his obligation for the period embraced in the settlement.

It is argued that these proceedings are in their nature criminal, designed to punish the crime of fornication, and therefore the offender cannot be allowed to escape punishment by a compromise, and the voluntary payment of a sum of money. But the only punishment prescribed by the Code is the maintenance of the child, or the payment of a sum adequate for that purpose, not exceeding thirty dollars per annum. If the putative father maintain the child himself, or voluntarily pays the mother having its custody such sum

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as may be agreed on between them, for the past maintenance of the child, whether more or less than thirty dollars a year, and the same be accepted in good faith, in satisfaction for such past maintenance, then he would not be liable upon his recognizance for the payment of any further sum for the period embraced in such settlement.

In the opinion of this Court, the receipt before us if the same was given *bona fide*, would discharge the appellants from any claim upon the recognizance for the antecedent period.

The receipt in terms, purports to discharge Townsend Barber from liability for the expenses of maintaining the child thereafter. In that respect it would be wholly inoperative, as plainly against the policy of the law. To sanction such prospective agreement would defeat the main purpose of the recognizance, which is to indemnify the county by providing security for the maintenance of the child. The recognizance creates an obligation, from which the conusor cannot relieve himself by any agreement he may make with other persons.

We have expressed this opinion as to the legal effect of the receipt, because that question has been argued, and as the case must be sent back for a new trial, its decision is material in the further progress of the cause.

We have had considerable difficulty in dealing with this case, owing to the confused manner in which the record is made up. None of the defendant's pleas properly present the question decided, and if we were to pass upon them severally, as they appear in the record, we should concur with the Circuit Court in its rulings upon the demurrers, that is to say if the first plea is to be construed as raising the question that notice was necessary to be given to the sureties as well as the principal.

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But in the present condition of the record there appears to be manifest error in the judgment. The defendant pleaded seven pleas to the *scire facias* to the 1st, 2nd, 3rd, 4th and 6th, the plaintiff demurred and traversed the 5th, and 7th.

The record shows that the Circuit Court ruled in favor of the plaintiff on the demurrers, and thereupon rendered final judgment against the defendants, while it does not appear that the 5th and 7th pleas were withdrawn or abandoned, and the issues of fact thereon were not tried or determined.

No notice was taken of this irregularity by the counsel in their printed arguments. But the final judgment being erroneously entered must be reversed and the cause remanded upon *procedendo;* when the defendants will have an opportunity of presenting their defence properly in their pleading, and the *bona fides* of the receipt if it is questioned may be passed upon by the jury.

Judgment reversed and
procedendo awarded.

(Decided January 10th, 1866.)

JAMES W. HURTT *vs.* SAMUEL WOODLAND AND OTHERS, BY THEIR NEXT FRIEND AND GUARDIAN DAVID C. BLACKISTON.

LANDLORD AND TENANT: CONTRACT, CONSTRUCTION OF: LEASE, SURRENDER OF. —J. F. W. executed on the 19th day of August, 1856, to J. W. P., a lease of his farm for four years from the 1st of January, 1857, reserving as rent one-half of all the grain raised on the farm, deducting seed wheat; also one-half of the potatoes, if more than five bushels are planted; also, one-half of the apples each year; and the tenant bound himself to sow one field in clover each year during the term. In the spring of 1857, J. F. W. planted one field of twenty-five acres in peach trees, which in 1857 and 1858 was

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cultivated in corn. This field becoming yearly less productive from the growth of the trees, in January, 1859, the said J. F. W. agreed to lease the same to the said J. W. P. for one year, the latter agreeing to furnish for said field two tons of Peruvian guano, and to work the same faithfully, in consideration whereof the former agreed that the latter should take therefrom eight hundred bushels of corn. The latter having assigned his interest in said lease and crop for the year 1859 to J. W. H., who received therefrom eight hundred bushels of corn, and also gathered and sold therefrom a crop of peaches, and received the money therefor. J. F. W. having in the meantime died, his heirs-at-law brought suit against J. W. H. to recover the value of the peach crop, HELD:

1st. That the relation of landlord and tenant as to the peach orchard field continued, notwithstanding the subsequent agreement. That under the stipulations and reservations of said lease, the tenant was entitled to the crop of peaches, and that his right thereto was in no way impaired by the subsequent agreement.

2nd. That the execution of the agreement cannot be considered a surrender of the lease.

PRAYERS AND INSTRUCTIONS BY THE COURT: FRAUD.—The defendant's prayer in said action, after reciting the evidence in the cause, asked an instruction that the facts were proper for the jury to consider as "evidence tending to prove fraud" by J. F. W. on J. W. P., HELD:

That the instruction was calculated to mislead the jury, who might have well supposed that the Court was instructing them as to the *sufficiency in fact* of the evidence to prove the alleged fraud.

APPEAL from the Circuit Court for Kent county.

This was an action by the appellees against the appellant to recover the value of a crop of peaches alleged to have been wrongfully taken by the appellant, assignee of the tenant, from lands held by the tenant under a lease, and the proceeds of which had been claimed and retained by the appellant.

The facts of the case are stated in the opinion of this Court.

The cause was argued before BOWIE, C. J., and GOLDSBOROUGH, COCHRAN and WEISEL, J.

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George Vickers, for the appellant, submitted the following points:

1st. That the paper marked B, of 31st January, 1859, is not a lease, and cannot operate as such to work a surrender of the subsisting lease between Woodland and Peacock.

2nd. That the paper B, if not a lease, is not such a contract as would change the relation of the parties as landlord and tenant, and effect a surrender of the existing lease between them.

3rd. That if the said instrument B is a new lease between the parties, the landlord could only take what is reserved by the terms of the lease, and not the peach crop, which was not referred to or mentioned.

4th. That the testimony offered by the defendant, now appellant, tending to prove fraud, was erroneously rejected by the Court.

And the appellant's counsel argued upon the first point, that the agreement of the 31st January, 1859, marked B, is not a lease; that a lease is said by *Woodfall, Land. & Ten.*, 56, to be a contract between parties, by which one conveys any lands or tenements to the other for life, for years,or at will, but always for a less term than the party conveying has in the premises. In *Archibold, Land. & Ten.*, 2 (53 *vol. Law. Lib.*,) a lease is declared to be a contract in writing, under seal, whereby a person having a legal estate in heriditaments, corporeal or incorporeal, conveys a portion of his interest to another, in consideration of a certain annual rent, or render, or other recompense.

It will be observed that by the agreement of January 31st, 1859, Woodland agreed to allow Peacock for his services, the said quantity of corn. It was no lease; the consideration is certain conditions; they are the furnishing of two tons of guano, tilling the land, and taking eight hundred bushels of corn, (and saving the fodder,) a full

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crop according to the testimony, in its then condition, for his (Peacock's) services. It was not designed that Woodland was to receive any grain or rent, and consequently none was reserved. The field was to be untouched. Peacock could not have cultivated it in corn under his lease; it would have been against the usage and custom of the country; but to gratify his landlord, P. agreed to cultivate as an extra or outside tillage on certain terms, but it never was intended to be a lease; the paper is destitute of some of the essential features of such an instrument, and it was not necessary it should have that form or character, to carry into effect the honest desire and purposes of either party. No estate was parted with by Woodland, no new lease, *quasi* lease, was accepted by Peacock, and the insertion of the name in a single instance cannot convert it into an instrument, whose characteristics are essentially different.

But if it had the form and some of the attributes of a lease, the want of others would render it ineffectual as such. It will be seen that the paper professes to lease the property for one year, but it contains no word about the commencement or termination of the alleged leasehold. In *Woodfall's Land. & Ten.*, 57, 73, it is laid down at sec. 5, that a lease for years must have a certain commencement, when it takes effect in interest or possession; a lease for one year, or half a year, constitutes the lessee tenant for years; the same doctrine is found in *Com. on Land. & Ten.*, 82, (*Law Lib.*, *No.* 10.) In the instrument of writing under consideration, no time is fixed for the beginning of the tenancy; it does not speak of a year from the date, nor from any other period, and is dated 31st January after the renting of property usually takes place. But to make a valid lease, rent must be reserved. Rents are reduced to rent service, rent charge, and rent seek. In each, a rent is specifically reserved. In every good reservation, these

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things must occur. It must be by certain and apt words; thus a lease for years, reserving rent after the rate of £18 a year, is void for uncertainty. It must be of some other thing issuing or coming out of the thing granted, and of such a thing as the grantor may have a remedy by distraint. *Woodfall, Land. & Ten.*, 80. The *reddendum* of a lease usually defines the rent to be paid, to whom, at what time, how and where. *Com., Land. & Ten.*, 96. *Arch., Land. & Ten.*, 30.

The agreement between Woodland and Peacock, of 31st January, 1859, is radically deficient in the principles and elements of a valid lease. The word "rent" is not mentioned, no part of the crop is reserved, nothing is referred to for Woodland's benefit, except the "fodder," which is to be "saved" for him, not as rent, but as a service of Peacock, for which service, in part, he was to take the specific quantity of grain mentioned. Neither can it be brought under the demise of land under our statute law, which provides a remedy by distress for a portion of crops, as a half, third, or specific quantity.

If it be not a lease, no presumption arises of a surrender by Peacock of one lease that he might take another. A surrender is defined in *Com., Land. & Ten.*, 336, to be, "a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them. See also, *Arch., Land. & Ten.*, 96, (*Law. Lib.*, 53.)

Where there is possession the surrender must be in writing, and cannot be by parol. A surrender in fact is made by express words. The statute of frauds requires a surrender to be in writing, or by "act and operation of law."

The last mode of surrender is where the parties, without

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express terms of surrender, do some act inconsistent with the subsisting relation of landlord and tenant, and implying an intention that the lessor should be in the same relation as if an express surrender had been made; as if the lessee take a new lease from his lessor, he thereby admits that the landlord is in as good condition to grant a new lease as if the old lease had been expressly surrendered. *Com., Land. & Ten.*, 339, 340. To make it a surrender by operation of law, the second lease must be in all its essentials a complete and operative lease, because no implication arises, unless one perfect lease is substituted by another, and the existence of the last is inconsistent with that of the first.

2. Upon the second point, having endeavored to show that the second paper, B, is not a lease, but only an agreement for cultivation of an orchard, we inquire if it is such an instrument as effectually abolished the relation of landlord and tenant, for that portion of land embraced by its terms. A case referred to in *Com., Land. & Ten.*, 343, is relied upon as an authority for such change of relation. It is that of the owner of a Ferry, having demised it, the tenant subsequently became the servant of the lessor, and conducted it for the benefit of the owner upon stipulated wages, which were paid. There the surrender was implied, or by operation of law. It is the case of *Peter vs. Kendal*, 6 *Barn. & Cress.*, 703. The peculiar facts worked a surrender, because the relation of the parties as landlord and tenant was entirely destroyed, and they became as master and servant, a relation entirely different and irreconcilable. It was there held a surrender, because of the radical change of duties and relation. To receive wages for labor and service in reference to the whole thing demised, was the opposite of paying rent for it and treating it as his own during the entire term. But in the present

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case the relation was not altered; the duties in their nature were the same as those of a tenancy—the cultivation of the land; they did not interfere with the general terms and integrity of the lease, as the land to be cultivated, being but a portion of the demised premises, could not have been planted in regular rotation of crops. It was in fact but a special agreement, outside the lease, for a particular purpose, and which might or not have been entered into without affecting the character or terms of the lease, or the relation of landlord and tenant. If it be not a lease nor contract for cultivation of an orchard, but an agreement for a lease as described in 1 *Arch., Land. & Ten.*, 22, it cannot be construed as a surrender, and there is no case which has fallen under the counsel's observation where an agreement for a lease has been construed to have the effect upon an executed and existing lease, as that of a new and perfect lease between the same parties. There can be no surrender of a lease at common law except by lease under seal.

3rd point. But for the sake of the argument, and to meet that aspect of the case, we assume that if the agreement B was a lease, the landlord could not claim the fruit growing on the trees, as the only reservation was that of blades or fodder, stripped from the growing corn. If a lease, the land, according to the definition of it, passed to Peacock, the tenant; for a lease is a conveyance of the land for a limited time, with undisturbed possession in the lessee. The tenant is entitled to everything that grows upon the land, except by express contract this general right is modified. If a stranger, says Lord COKE, in 2 *Inst.*, 303, commit waste, the tenant shall have an action against the wrongdoer. It is said, however, in 3 *Lee*, 209, referred to in *Com., Land. & Ten.*, 577, that the reversioner may main-

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tain suit for injury to the body of trees by a stranger, but the lessee, for the shade and fruit. The only claim a landlord can have to anything on, or raised upon the demised premises, must result from a saving and exception in the lease. The exceptions are always construed most strictly against him, upon the principle that a deed is to be interpreted more unfavorably to the grantor. In 1 *Shep. Touch.*, 77 and 78, and in *Com., Land. & Ten.*, 76, 77, it is said, that exceptions in leases must be in apt words, as "saving," "excepting," &c., because that which is excepted is reserved from the grant or lease, and does not pass by it. Under an exception of "all wood and underwood," trees, great and small, are generally excepted, but not fruit trees, which do not pass by the denomination of wood, or trees; and in the later case, *Butler vs. Dunning*, 5 *Barn. & Cress.*, 842, where timber and other trees were excepted, but not the annual fruit thereof; apple trees were held not to pass. *Com., Land. & Ten.*, 78. *Woodfall, Land. & Ten.*, 92, 93.

In the agreement between Woodland and Peacock, there is no mention of trees or fruit as excepted. The whole field passes to Peacock, the mode of cultivation and application of a specific fertilizer designated, and also the quantity of grain Peacock was to get for his labor, but no reference was made to trees or fruit, either by "saving" or "excepting," and consequently no right to the fruit could accrue to Woodland.

4th point. The appellant's counsel contends that the Court's refusal to give the instruction asked for by him in the third bill of exceptions, was error. The facts admitted and proved, are embodied in appellant's prayer below, and show that an undue advantage was attempted by Woodland upon Peacock.

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The prayer was that the facts were proper for the jury to consider as evidence tending to prove fraud by Woodland on Peacock. It is the practice and policy of Courts, where fraud is alleged, to allow great latitude of proof to establish it, and it may be established by circumstantial and indirect testimony. In *Davis vs. Davis et al.*, in 7 *H. & J.*, 39, it is said that where the facts are so light and inconclusive that no rational, well constructed mind can infer the fact, which it is offered to establish, the Court will reject it; in that case where no fraud was alleged, the proof was indefinite and intangible, and could not lead the mind to any definite and sensible conclusion. In *Cole vs. Hebb*, 7 *H. & J.*, 27, the Court state the rule to be, that where there is any legal, admissible evidence tending to prove the issue, the effect of that evidence is solely for the consideration of the jury, the word "tending" meaning that a rational, common sense intellect might draw from it the conclusion to which, by its production, it was desired to lead the jury, and that if there be any evidence tending to the proof, however weak, it ought to be submitted to the consideration of the jury; and on page 28, it is said the total failure of evidence does not mean only the utter absence of all evidence, but it means a failure to offer proof, either positive or inferential, to establish one or more of the many facts, &c.

In *Turner vs. Turner*, 1 *H. & G.*, 162, the Court of Appeals reversed the decision below where slight testimony to prove the issue was rejected. In *Caton vs. Shaw and Tiffany*, 2 *H. & G.*, 14, facts apparently inconclusive were admitted to support the plaintiff's claim, and in *Smith vs. Walton*, 8 *Gill*, 77, the Court decided that the sufficiency in fact, of testimony to sustain the issue, is exclusively a question for the jury; and in the case of *Morgan vs. Bitzenberger*, 3 *Gill*, 355, the same principle is rcognized. In *Walter vs. Dashiell*, 1 *Md. Rep.*, 474, it

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was held by the Court that any fact, however slight, if at all relevant to the issue, will be admitted in evidence.

In the case under discussion the facts and circumstances, the inequality of the parties, the illiterate and ignorant condition of the one, without adequate knowledge of the definite meaning and the rules for the construction of language, of the common or legal import of technical or other words employed in contracts, and of the effect of particular phrases on matters not spoken of or alluded to by the parties, and the carefully concealed, but real purpose of the other party, furnish tangible evidence to the mind of undue advantage essayed to be taken, and should have been submitted to the candid judgment and deliberate consideration of the jury.

E. F. Chambers and *J. A. Wickes* for the appellees.

The points made by the appellees are as follows:

1st. That the original lease executed by Woodland and Peacock on the 19th of August, 1856, and marked A, was surrendered by act and operation of law, so far as respects the peach orchard field, when the agreement of the 31st of January, 1859, marked B, was executed by the same parties.

2nd. The original lease being surrendered by the execution of the agreement, marked B, so far as respects the peach orchard field, that the peaches grown on that field, in the year 1859, by the true construction of that agreement were the property of Woodland.

3rd. That the prayer of the appellant was properly rejected by the Court.

1st. When the agreement of January 31st, 1859, was executed by Woodland and Peacock, the original lease between the same parties, marked A, so far as respects the peach orchard field, was surrendered.

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A surrender of a lease for life or for years is either in fact or in law. A surrender in fact is made by express words, clearly manifesting the intention of the lessee to yield up his interest. The statute of frauds enacts, "that no lease for term of years shall be surrendered, unless it be by deed or note in writing, signed by the party surrendering the same, or his agent authorized by writing, or by act and operation of law." *Com., Land. & Ten.*, 337, 338.

The agreement of January, 1859, is not a surrender by express words, but a surrender under the last clause of the preceding section of the statute of frauds, by act and operation of law. A surrender by act and operation of law is where the parties without any express surrender do an act so inconsistent with the subsisting relation of landlord and tenant, as to imply an intention that the lessor should be in the same situation as if an express surrender had been made; thus if the lessee take a new lease of his lessor, he thereby admits that the lessor is as much in a condition to grant a new lease as if the old lease had been expressly surrendered. *Com., Land. & Ten.*, 340. *Arch., Land. & Ten.*, 83. *Whitely vs. Gough, Dyer*, 140, *b*. *Hamerton vs. Stead*, 3 *Barn. & Cress.*, 478. *Livingston vs. Potts*, 16 *Johns*, 28.

An agreement for a new lease by a lessee, where he occupies the premises under the agreement, will operate a surrender of an old lease, although the lease contracted for was never granted. *Hamerton vs. Stead*, 3 *Barn. & Cress.*, 478.

The taking of a new lease by the lessee of the same premises is an act so inconsistent with the relation of landlord and tenant, as to imply a surrender of the old lease by the lessee. It is not, however, the only act from which the law implies a surrender.

The argument of the appellant appears to be based upon

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the assumption that a new lease is essential to create a surrender by act and operation of law. The authorities, on the contrary, will fully sustain the position, that any agreement between the lessor and lessee showing that the relation of landlord and tenant, under the old lease, has been waived or annulled; or any acts done by mutual consent, from which it may be inferred that the old lease has been abandoned, will operate as a surrender.

Where the lessee was in possession, under a written lease, of a house, and before the rent was due the wife of the lessee delivered the key back to the landlord, who accepted it, it was held that the delivery back of the key by the tenant, *animo sursum reddendi*, and the acceptance thereof by the landlord, amounted to a surrender of the term by act and operation of law, within the statute of frauds. *Dodd & Davis vs. Aclorn*, 6 *Mann & Grang.*, 671.

Where the lessee underlet, and the lessor accepted the under lessee as tenant, which acceptance was afterwards assented to by the original lessee, the Court of King's Bench held that this amounted to a virtual surrender of the lessee's interest by act and operation of law. *Thomas vs. Cook*, 2 *Barn. & Ald.*, 119. *Com., Land. & Ten.*, 343.

Again, where the lessee during his term leases the premises, and the lessor at his request leases the property to a third person, it was held that the facts constituted a surrender under the statute of frauds. *Nickells vs. Atherstone*, 10 *Adol. & Ell.*, 943. It is evident, therefore, that the taking of a new lease by the lessee of the same premises is not the only act from which the law will imply a surrender of the old lease.

Why does the law imply a surrender of the old lease, when the lessee takes a new lease of the same premises? The reason is apparent. The old and the new leases cannot co-exist. Under the old lease the lessor has no right

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to give a new one, or the lessor to accept, and by taking a new lease the lessee impliedly admits that the lessor has the right to grant it.

It is not material or necessary in considering the question at issue that the contract between Woodland and Peacock, executed 31st of January, 1859, should be construed to be a lease; on the contrary, grant that it wants some of the attributes of such an instrument; suppose it to be a contract of hiring, by which Woodland, who was anxious to have his peach orchard cultivated, hired the services of Peacock for that purpose, and agreed to pay him for such services, in fact, all the corn he could raise on that field, the acceptance of a new lease by the lessee is but one form of contract between the parties, from which the law implies a surrender. Any other contract entered into between them, which changes their relations or rights in relation to the property, under the old lease, or which is inconsistent with the relation of landlord and tenant, under the old lease will have the same effect. *Peter vs. Kendall*, 6 *Barn. & Cress.*, 703. *Com., Land. & Ten.*, 344.

The case of *Peter vs. Kendall*, 6 *Barn. & Cress.*, is conclusive on this point, and is a case very similar to the present. In that case the plaintiff leased a ferry to B for a year for fourteen pounds a year, but a few weeks afterwards, B finding it unprofitable, it was agreed that the plaintiff should take the earnings of the ferry and allow B certain wages. B continued the boatman of the plaintiff under this agreement, accounted for what he received, and was allowed the stipulated wages. It was held that this contract operated as a surrender of the lease. BAYLEY, Judge, said "B became the servant instead of the tenant of the plaintiff. A new relation, which in regard to this property was wholly inconsistent with that of landlord and tenant, then took place with the consent of both parties,

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that operated as a surrender by operation of law of the tenant's interest in the ferry."

By the contract of 1859, between Woodland and Peacock, the relations of the parties their rights and obligations under the lease of 1856 were entirely changed, so far as respects the peach orchard field. Under the old lease Peacock could not cultivate this field; it was not in regular cultivation, and had he cultivated it, he would have violated his lease. Peacock, under the lease, was to give Woodland one-half of the grain raised, reserving the residue for himself; under the contract of 1859, for the service of cultivating the peach orchard field, he is to receive, in fact, all of the corn raised on it. It is evident from the agreed statement of facts that eight hundred bushels of corn, by the use of guano, could in all probability be raised on this field in 1859. This quantity Peacock is to receive for his services. Under the contract of 1859 Peacock assumes new obligations and acquires new rights. He ceases to be the tenant of Woodland, so far as respects the peach orchard field, and hires his services to him for stipulated wages, which he received. By entering into this contract Peacock admits that Woodland had power to make it, which he could not have had if the lease of 1856 had not been surrendered. *Com., Land. & Ten.*, 83.

A new relation, inconsistent with that of landlord and tenant, took place with the consent of both parties, which operated as a surrender in law of Peacock's interest, as tenant, in the peach orchard field. The expression in the statute of frauds, "surrendered by operation of law," applies to cases, says Lord DENMAN in the case of *Nickells vs. Atherstone*, 11 *Jurist*, "where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, or which would not be valid, if his particular estate had continued to exist.

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It is not necessary, as is assumed by the appellant in his argument, that the contract of 1859 between Woodland and Peacock, should have included the whole of the farm, in order to operate as a surrender of the lease of 1856. It appears to be conceded in argument, that had the contract of 1859 embraced the whole of the land demised, Peacock would in that event have ceased to be the tenant of Woodland, and have become his servant for a particular purpose, and for stipulated wages, and that thereby the lease of 1856 would have been surrendered. If this be conceded, on what principle can it be doubted that the lease of 1856, so far as respects the peach orchard field, was surrendered when Peacock executed the contract of 1859? By that contract his relations as tenant of that field were put an end to. He agrees to perform specified work for stipulated wages which Woodland agrees to pay.

The principle is well established, that where the lessee accepts a new lease of a part of the premises only, the new lease will operate as a surrender in law of the old lease, so far as respects that part of the premises comprised in the new lease. *Fish vs. Campion*, 2 *Rol. Abr.*, 498, 1. 50. *Arch., Land. & Ten.*, 83. *Com., Land. & Ten.*, 344, *Marg. paging.*

The authorities heretofore cited clearly sustain the position, that any contract in reference to the demised premises, which alters the relation of the parties to a lease, in a manner inconsistent with the relation of landlord and tenant under the lease, will operate as a surrender of the lease. If therefore such a contract embraced but a part of the demised premises, it will operate as a surrender of the lease as to that part. It is clear that Peacock did not cultivate the peach orchard field during the year 1859, as lessee under the lease of 1856. The cultivation of that field in 1859 would have been a violation of the lease of 1856. He did not give Woodland one-half of the corn

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raised on that field in 1859, as rent under the lease of 1856, but appropriated the whole of it to his own use. In what capacity then did he cultivate the field? He could not cultivate it as lessee, and also as the servant of Woodland, working for stipulated wages. The relations were inconsistent. We contend, therefore, that the conclusion is irresistible, that while the lease of 1856 may have been operative as to the other portion of the farm, it was surrendered, so far as respects the peach orchard field.

Should the contract of 1859 be construed to be a lease, then it is admitted that the lease of 1856 was surrendered.

No particular words are necessary to constitute a lease. The intention of the parties is the proper criterion by which the nature of the instrument is to be judged. *Com., Land. & Ten.*, 74.

Where the language used was, that "A shall have, occupy and enjoy land;" or, "I will you shall have a lease for twenty-one years;" or, "A doth let certain lands to B for such a term;" in each of these cases the instrument was construed to be a lease. *Com., Land. & Ten.*, 61, 62, and 63. Neither is it necessary that the time from which a lease shall commence shall appear. It shall be taken to commence from the delivery of the lease, if no certain time is mentioned. *Com., Land. & Ten.*, 80. The first prayer of the appellee was therefore properly granted by the Court.

2nd. The lease of 1856 being surrendered by the contract of 1859, so far as respects the peach orchard field, the peaches grown on that field, in 1859 and 1860, by the true construction of that contract, were the property of Woodland or those claiming under him. This proposition has been incidentally discussed in considering the first point made by the appellees.

If the contract of January 31st, 1859, is a contract of

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hiring, (which is the view of the counsel for the appellees,) by which Peacock parted with his interest as tenant in the peach orchard field, and hired his services to Woodland for certain wages, then it is clear that Peacock had no other interest in the product of that field, or the profits arising therefrom, than the eight hundred bushels of corn which he was to receive for such services—all other products of the field belonged to Woodland.

Should the agreement of 1859 be construed by the Court to be a lease or an agreement for a lease, it is apparent that the rent reserved by Woodland is all of the products of the field, except the eight hundred bushels of corn. Rent is not reserved *eo nomine*, but the paper shows clearly the intention of the parties. The reservation of rent requires no technical language. It may be made in any form of words which express or imply that a return of something which was not in the lessor before, is to be made in lieu of the property demised. *Arch., Land. & Ten.*, 34. *Com., Land. & Ten.*, 99.

3rd. The prayer of the appellant was properly refused by the Court. There was no evidence of fraud intended or practiced by Woodland.

The rule is too well established in this State to be questioned, that the legal sufficiency of evidence is a question of law, of which the Courts are the exclusive judges. If there is no evidence to support the issue, or if the testimony is so light and inconclusive that no rational, well constructed mind can infer from it the fact which it is offered to establish, it is the duty of the Court to withhold it from the jury. *Davis vs. Davis*, 7 *H. & J.*, 39.

The doctrine laid down in the case of *Davis vs. Davis*, is sustained in the latter case of *Cole vs. Hebb*, 7 *G. & J.*, 27 and 28. In the case of *Cole vs. Hebb*, in commenting upon the opinion delivered in *Davis et al. vs. Barney*, 2 *G. & J.*, 282, in which the law on this subject is declared

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to be, "that where there is any legal, admissible evidence tending to prove the issue, the effect of that evidence is solely for the consideration of the jury;" the Court say, "the word 'tending,' as there used, was not designed by the Court to be understood in its literal or vulgar sense, but to be understood according to its legal intendment, namely, as so tending to prove the issue, that a rational, common sense intellect might draw from it the conclusion to which, by its production, it was desired to lead the jury."

Applying this rule it is hardly possible to draw from the evidence in this case the conclusion, that the contract of 1859 was fraudulently designed by Woodland, and that the language used in the wording of the contract was intended to entrap Peacock.

O. Miller for the appellant, in reply.

The argument of Judge CHAMBERS seems to abandon altogether the idea that this was a new lease, and he thus gives up the theory that there was any surrender by operation of law, of the existing lease of 1856, by reason of the execution of a new lease, which is put in the books as the usual mode by which such a surrender is effected. He assumes it was a mere contract, and not a lease, and so construing it, insists that its mere execution put an end to the original lease; and then further contends, that construed as a contract it does not give the appellant the peaches. He is forced to this argument to avoid the stress of the appellant's point, that if paper B is to be regarded as a lease, then, under it, everything growing on the land belongs to the tenant, except what, by the terms of the lease, is reserved to the landlord, because by the very nature of a lease, the tenant becomes entitled to the undisturbed possession of the land for the term;

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the landlord cannot even put his foot upon it without committing a trespass, and he can take nothing from the land except what is reserved to him by the lease; everything else belongs to the tenant.

But if we consider this paper as a mere contract, what then? Did its mere execution, as the instruction puts it, work a surrender of the original lease by act and operation of law? Or, taking broader grounds, did the execution of this paper, or anything done under it, work such a surrender? It is respectfully submitted, that it has no such effect, as has already been shown in the opening argument for the appellant.

"A surrender, by act and operation of law, is where the parties, without any express surrender, do an act so inconsistent with the subsisting relation of landlord and tenant, as to imply an intention that the lessor should be in the same situation as if an express surrender had been made." *Com., Land. & Ten.*, 340. *Arch., Land. & Ten.*, 83.

If such a contract works a surrender of the lease, "by act and operation of law," then it will follow that any act or agreement in writing or by parol, by which any of the *modal* conditions or terms of a lease may be in any particular varied or changed, will have the same effect. Such, however, it is confidently submitted, is not the law; Courts so far from being anxious to extend this doctrine of the surrender of leases by act and operation of law, are, on the contrary, inclined against it, and only apply it in plain cases, where the facts exclude any other reasonable mode of solving the difficulty. The rule as laid down in the elementary books, *Comyn* and *Archibald*, has already been stated. The cases relied on by the other side, so far from sustaining the position for which they are cited, do but strengthen that of the appellant.

If all the cases cited by the appellees be examined they will all be found to be cases where the acts relied on

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showed an unequivocal intention to destroy and put an end to the existing relation of landlord and tenant. Here it is confidently submitted no such intention can be inferred, but exactly the opposite. The tenant never intended to give up his rights under the lease, and destroy the existing tenancy as to this field, but merely for the accommodation of the landlord, who wanted the field in which his trees were planted, and which he would soon possess on the expiration of the lease, cultivated out of its terms, and the agreement was made simply to carry out this purpose, and not in any way to interfere with the existing relation under the lease of 1856. It was a mere contract subsidiary to the lease and not subversive of it, for the cultivation of a particular field for a particular year, which otherwise the tenant would not have been bound then to cultivate.

The argument of the appellees on the second exception, contains the essential vice of assuming the very position under discussion, viz: that the execution of this agreement put an end to the lease. He assumes this and then argues upon the construction of the contract, as if it were not a new lease, but simply a contract made by parties between whom no other relation ever existed or was ever intended to exist, save that which the contract itself created. Now with the construction of this contract in *that aspect*, this Court in this case has nothing to do. It was either a new *lease* or a mere contract not amounting to a lease; if the former, then there was a surrender *pro tanto* of the existing tenancy, and the relation of *landlord and tenant* thenceforth existed under this *new lease*, and in that case, upon all the authorities the peaches belonged to the appellant, because there is no *reservation* of them to the landlord; if the *latter*, then the only inquiry is, did it operate a surrender by operation of law of the existing lease of 1856? I have endeavored to show by reason and authority that it did not

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have such effect, and if I am right in this, then the peaches belonged to the appellant under the original lease.

WEISEL, J., delivered the opinion of this Court.

James F. Woodland executed on the 19th day of August, 1856, to Joseph W. Peacock, a lease for his farm in Kent county, called "Marshy Point," for the term of four years, commencing on the first day of January, 1857, reserving as rent one-half of all the grain raised on the farm, deducting seed wheat; also, one-half of the potatoes if more than five bushels were planted. The landlord likewise reserved to himself one-half of all the apples each year, and the tenant bound himself to sow one field in clover each year during the term. These were the only reservations and stipulations in the lease.

It appears from the agreed statement of facts in the case that Peacock took possession of the farm under the lease on the first of January, 1857; that in the spring of that year a field of 25 acres on the farm was planted in peach trees by the landlord, Woodland; that this field, called then and afterwards the peach orchard field, had been cultivated in corn in 1856; that it was also cultivated in corn in 1857 and 1858, the two first years of the lease, by the tenant, producing 1200 and 800 bushels of corn in those years respectively; and that it was not in regular cultivation in 1859. It was also admitted in said statement that a field planted in peach trees will produce less corn each successive year, other things being equal; that ploughing peach orchards and cultivating them in corn are considered beneficial to the trees, their health and growth, and that ordinarily peach trees do not bear fruit that remains and matures until the fourth year, and the yield is generally not large prior to the trees being four years old.

On the 31st of January, 1859, the third year of the term

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having commenced, an agreement in writing, signed by Woodland and Peacock, was entered into in these words: "This agreement, made this day between J. F. Woodland and Joseph Peacock, both of Kent Co., Md., witnesseth that the said Woodland for and in consideration of certain conditions hereinafter mentioned, agrees to lease to the said Peacock, the peach orchard field at Marsh Point, for the term of one year; the said Peacock agrees to furnish two tons of Peruvian guano for said field, and to till it in corn, the said corn to be planted and worked in farmer-like manner, and the fodder saved in like manner for said Woodland, who agrees for said service of Peacock, to allow him off of said field of corn to take eight hundred bushels."

It was proved in the cause that this agreement was the result of a conversation a few days before between the parties, in which Peacock told Woodland that he did not think he could till the peach orchard again in corn, that it was not fair he should till it and receive nothing from it, stating his losses the two preceding years in consequence of the peach trees.

Peacock, according to the agreed statement of facts, cultivated the peach orchard field in 1859, in pursuance of the agreement, and assigned all his interest in the lease and crops in the summer of that year to James W. Hurtt, the appellant, the defendant below, who received eight hundred bushels of corn from the field, and also gathered and sold the peaches from the trees both for that year and the year following, and received the money therefor. Woodland, the landlord, having died in March, 1859, this suit was brought by his heirs at law, (the appellees,) to recover the value of the peach crop of that year.

This controversy as to the right to the peaches, depends upon the character and construction of the agreement of 31st of January, 1859.

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By the appellees it is contended that it operated as a surrender of the lease so far as the peach orchard was concerned, and the fruit became their right and property. The two prayers of the plaintiffs below were based upon this construction and assumed legal effect of it. By the first of these prayers the instruction was asked, that if the jury believed that the lease and the agreement had been executed by the parties to them, then the lease was surrendered and put an end to by the agreement, so far as concerned the peach orchard field; and by the second, that by a true construction of the agreement, the peaches growing on the peach orchard field were not conveyed to Peacock, the tenant, but remained the property of Woodland, the lessor.

It is not pretended that the lease, as to this field, had been surrendered in any way at any time previous to the agreement. The agreement itself, and what took place under it, are relied upon by the appellees as a surrender of the lease by operation of law; not by way of a new lease; for if so construed, then the lessee would be clearly entitled to the peach crop, inasmuch as it was not reserved by the instrument to the landlord.

Can it then be construed or regarded as a contract, so inconsistent with the terms of the lease and the relation of landlord and tenant under it, as to operate a surrender of the lease as to this field, or to change the rights of the tenant, under the lease, to the peach crop?

We do not see that such is the character or legal effect of the agreement. Looking at it and its attendant circumstances as given in proof, we discover nothing to change the relation of landlord and tenant that existed between the parties under the lease. The field was a part of the demised premises which the landlord, during the lease, had been permitted to plant in peach trees. To encourage their growth the tenant had cultivated it two successive years in

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corn, and as he alleged, at a loss, rendering half of the yield to his landlord as rent reserved by the lease. It was not in regular cultivation in 1859, the next year. To repeat the cultivation was beneficial to the landlord in the growth of his trees, but was not the duty of the tenant, who was unwilling to expend another year's labor upon it without an increased remuneration, a share larger than that which the terms of the lease would afford him, hence the agreement, in which the only change is in relation to this field, stipulating for another year's cultivation of it in corn at an increased compensation to the tenant for the service and outlay he was to bestow, and the risk he was to incur, the landlord being satisfied with the fodder and all the corn raised above 800 bushels as his portion. The agreement is entirely silent as to the peaches, and nothing was said by the parties about them when the negotiation was in progress. Whatever opinion the landlord may have secretly entertained at the time, and afterwards openly expressed respecting his right to them, it is very clear from the tenant's declarations in reference to the subject, that he did not design to relinquish by the agreement his rights as tenant to the fruit. So far as his consent was necessary to the disturbance of the relation of landlord and tenant, it had not been given. The terms were only varied as to a portion of the leased premises, but the relation itself, and all rights not affected by the agreement, remained as before. If the agreement had not been entered into, the peaches were the tenant's, and there is nothing in the agreement itself, or in its mode of execution, which could have the effect of depriving him of this right. If he meditated any sharpness in the bargain, he had the benefit of it in the corn which he expressly stipulated for. If the landlord plumed himself upon his sagacity, he failed in the scheme by not being as equally express in reserving the

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fruit of the trees; the bare mention of which would in all probability have defeated the arrangement, and left the field without the additional stimulus of a year's cultivation.

We therefore are of opinion that the relation of landlord and tenant, as to this field, continued notwithstanding the agreement, and that the tenant's right to the peaches was not impaired by it. The Court below was therefore in error in granting the prayers of the plaintiffs.

Having determined that the agreement did not deprive the lessee of his right to the peaches, it might be immaterial to pass upon the instruction of the Court below on the defendant's prayer.

But the Court think, on examining the prayer and the form of the instruction asked by it, in the light of the various decisions cited in the argument, that the Court below was correct in refusing the instruction sought. The question was not as to the admissibility of the evidence to prove fraud, for all the evidence was in for the purposes of the cause. But the instruction, if given, was calculated to mislead the jury, who might well have supposed that the Court was instructing them as to the *sufficiency in fact* of the evidence to prove the alleged fraud. *See* 16 *Md. Rep.*, 445. *Maltby vs. North W. Va. R. R. Co.*

Judgment reversed and procedendo awarded.

(Decided January 22nd, 1866.)

JAMES W. HURTT *vs.* SAMUEL WOODLAND AND OTHERS.

APPEAL from the Circuit Court for Kent County.

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The cause was argued before BOWIE, C. J., and GOLDSBOROUGH, COCHRAN and WEISEL, J.

George Vickers and *O. Miller* for the appellants.

Ezekiel F. Chambers and *J. A. Wickes* for the appellees.

WEISEL, J., delivered the opinion of this Court.

The facts and questions being the same in this as in the preceding case, between the same parties, except that the action in this case was instituted to recover the value of the peach crop for the year 1860, the views and conclusions of the Court in that case also govern this. For the reasons therein assigned the Court below erred in its instructions to the jury on the prayers of the plaintiffs, and its judgment must therefore be reversed.

Judgment reversed and procedendo awarded.

(Decided January 22nd, 1866.)

ALFRED GALLAGHER ET AL. *vs.* CHARLES SHIPLEY.

LANDLORD AND TENANT; FARMING LEASE AND LEASE IN GENERAL TERMS: RIGHTS AND POWERS OF LESSEE: REMOVAL OF MANURE FROM PREMISES: IRREPARABLE DAMAGE.—It is settled by the general current of American as well as English authorities, that a tenant under a farming lease or contract has no right to remove from the premises so occupied, without an express stipulation to that effect, any manure made in whole or in part from the produce of the land.

But where a lease is general in its terms and provisions, and says nothing as to the *purposes* for which the demised premises are to be used, or *how* they are to be used and occupied, the lessee is clothed with full power and right to occupy and use them for any lawful purpose not injurious to the reversion.

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Under such a lease there is no substantial ground for disputing the right of the lessee to the manure, accumulated by feeding cattle upon the land from provender brought upon the premises from other sources; nor of contesting, as likely to result in irreparable injury to the land, his right of removing the same so far as it is not commingled with the soil, provided that in removing the same he uses such diligence and skill as will prevent injury to the land.

VERBAL AGREEMENT BETWEEN PARTIES TO LEASE, ITS EFFECT UPON THE RIGHTS OF SUB-TENANT WITHOUT NOTICE.—Whatever may be the case as between the immediate parties to a lease, no mere verbal understanding between them can affect the rights of persons holding under the lessee without notice of it.

APPEAL from the Circuit Court for Baltimore City.

The bill in this case was filed by the appellee, and alleged that he leased, on the 2d January, A. D. 1861, a parcel of land, consisting of seven separate fields, in Baltimore county, to W. S. Mabbett and J. McCullum, for eight years and eleven months, at an annual rent of $650, and filed the lease as an exhibit with the bill; that afterwards the lessees sub-leased the greater part of it to one J. D. Ulery; that by some means unknown, the possession of the part so sub-leased was acquired by Lewis Myers and others; that at the time of the lease it was the understanding of the complainant that the land should only be used for pasturing the usual number of cattle placed upon a like quantity of land, but that a greater number had been placed and fed there; that for the last five months, the fields have been in the possession of Myers and others, and used as pens for immense herds of cattle, brought there to be slaughtered for the United States army and the city of Baltimore; that large quantities of manure have been dropped upon the soil, and that by reason of the moisture of the soil, and the trampling of the cattle, the manure has been so mixed with the soil, that it is impossible to remove the one without taking away the other; that Mabbett and McCullum had top-dressed

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the land with manure, to remain there permanently, and by the trampling of the cattle it had become mixed with the soil and the manure dropped by the cattle.

The bill further charges, that Gallagher, claiming under an alleged purchase from Myers and others, all the manure dropped by the cattle, had been for several days engaged with a large and sharp iron scoop, about five or six feet square, drawn by one horse, in subverting and digging up the soil and subsoil, and the manure mixed with it, to the depth of several inches, collecting it in piles, and was about to remove it from the land, the soil of which was thin, and its chief present value being its eligibility for pasturage lots; that such subversion and removal will result in irreparable injury to the fields, for which no recovery in damages would be an adequate compensation, and in their destruction for their use for the purposes they had been theretofore enjoyed, and that his remonstrances against it had been disregarded. That by the terms of the lease the land was to be left in as good condition as it was at the date of the lease, and that will not be possible so to leave it unless Gallagher be restrained. The bill then prays for an injunction against Gallagher and the other defendants named, restraining them from any "further digging up, piling and hauling off, of the soil and manure upon the fields."

The Court granted the injunction as prayed. The answer of Gallagher states that he supposes it to be true that the land was leased as stated, but that he hath no knowledge of any sub-leasing, and admits nothing about it; that he knows nothing of any understanding as to how the land was to be used, and submits that the whole contract is set forth in the lease, and that the complainant as against him can add nothing thereto; that the land by

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assignments or sub-leases to him unknown, was, on the 1st July last, lawfully in the possession of the United States Government, whose proper officer, one Captain Murphy, entered into an agreement with him to remove the manure and clean the land, so that the Government cattle there kept for the use of the army, could be safely kept and advantageously provided for, and that in pursuance of such agreement he was engaged in removing from the superficies of the soil the manure, which if not done would prevent its use for the purposes of the Government; that he removed it with a scoop four feet broad, made of wood, with an iron rim drawn by one horse, which did not and could not penetrate the soil; that he neither subverted or removed the soil, and that he did not the smallest, much less an irreparable injury to the land; that the allegations of the bill in regard thereto were an idle pretence, without any foundation save the grasping desire of complainant to have that to which by law he was not entitled; that for agricultural purposes, despite of all scraping, the land will be left greatly richer than it was before; and he files as exhibits two military orders, directing him to proceed with its removal, but which out of respect to the injunction he has not obeyed; that if he does not do it the military authority will have it done by some one else, and that the design of the complainant is by an injunction to operate in restraint of that authority; that the complainant has a complete remedy at law, and this Court no jurisdiction; that the remaining defendants named in the bill had no interest, nor agency in regard thereto, and were improperly made parties, and that the said Captain Murphy should have been made a party as the person by whose orders the supposed grievances had been committed. The answer was duly sworn to. A motion was made to dis-

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solve the injunction, and evidence taken by both parties as provided by the Act of Assembly. The motion was not granted, but the Court by order passed September 23rd, 1865, continued the injunction until final hearing. The testimony taken was quite voluminous, much of that taken on the part of the complainant being excepted to by the defendants. The general effect of so much of the evidence as was admissible is sufficiently set forth in the opinion of this Court.

From the order passed on the 23rd of September, 1865, the defendant, Gallagher, appealed.

The cause was argued before BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL.

George H. Williams and *Robert C. Barry* for the appellants, argued,

1st. That to sustain the injunction, the burden of proof is on the complainant to show irreparable injury and destruction of the inheritance, and that unless he shows this, the remedy if there be damage is at law, and there is no case for an injunction; that the answer denied all the equity, and was evidence on the motion to dissolve. *Hamilton vs. Ely*, 4 *Gill*, 34. *White vs. Flannigan*, 1 *Md. Rep.*, 543, 548. *Green vs. Keen*, 4 *Md. Rep.*, 98. *Cherry vs. Stein*, 11 *Md. Rep.*, 1. *Shipley vs. Ritter*, 7 *Md. Rep.*, 408. *Dorsey et al. vs. Hagerstown Bk. et al.*, 17 *Md. Rep.*, 412.

2nd. That the overwhelming proof in the cause is, that the small wood scraper actually used on these premises, weighed only some sixty-five or seventy pounds; that it could not be held at an angle with the surface of the soil while in use; that it did not and could not penetrate the soil, nor be made to penetrate it, and that either for farming purposes, or for feeding cattle it was necessary to remove the manure.

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3rd. That on examination of the piles of manure for the purpose of ascertaining the fact, no soil was found therein.

4th. That the bill alleged no usage or custom as to the removal of manure, or the right to do so, and therefore the issues do not involve it.

5th. That a usage not to remove manure from a farm dropped thereon by cattle fed on what is grown on a farm, even if proved, has no application to lots on the edge of a large city used as cattle pens, for cattle fed with food brought from elsewhere. *Plumer vs. Plumer*, 10 *Foster's N. H. Rep.*, 558. *Fay vs. Muzzey*, 13 *Gray*, 53.

6th. That the proof in this cause fails to establish proof of general custom as required by law. *Foley vs. Woodside*, 6 *Md. Rep.*, 37.

7th. That the proof of what was done elsewhere by a different kind of scraper, and in other ways was irrelevant to this cause, and the exceptions thereto well taken, and so as to the attempted proof of a custom not alleged in the bill.

8th. That all the proof pertinent to complainant's case was brought out by interrogatories grossly leading, and should be ruled out, and the exception thereto deemed well taken. *Ridgaway vs. Toram*, 2 *Md. Ch. Dec.*, 314.

A. W. Machen and *William A. Fisher* for the appellee.

I. The acts in question are acts of *waste*, and whenever there is privity between the parties, waste will be enjoined in equity without inquiring whether in the particular case the apprehended injury could be compensated in damages or not; where *no* privity exists, a case of irreparable injury must be shown. 2 *Story Eq. Jur.*, § 917, 919. *Duvall vs. Waters*, 1 *Bland*, 576, 577. *Steward vs. Winters*, 4 *Sandf. Ch.*, 590. Every person who enters under the tenant, or with his consent, stands as he does, is affected by the same

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privity, and is equally subject to be restrained by injunction from committing waste. *Howard vs. Ellis*, 4 *Sandf. Sup. Ct.*, 369. *Courthope vs. Mapplesden*, 10 *Ves.*, 290. *Norway vs. Rowe*, 19 *Ves.*, 154. *Maddox vs. White*, 4 *Md. Rep.*, 72. In this case, Gallagher's answer distinctly admits that he came in under the lease. The defendant was committing waste in two ways: viz. by the removal of soil, and by the removal of manure.

1. *Any* removal of soil goes to the disherison of the landlord, and is waste, and equity will enjoin it, no matter how small the apparent injury. *Livingston vs. Reynolds*, 26 *Wend.*, 122. *Sarles vs. Sarles*, 3 *Sandf. Chan.*, 601, 603. And a threat to commit waste is sufficient justification for the bill. *Duvall vs. Waters*, 1 *Bland*, 576. *Gibson vs. Smith*, 2 *Atk.*, 182.

2. In the absence of a special custom authorizing a tenant to remove manure made upon land which has been leased for agricultural purposes, or an express agreement to that effect in the lease itself, such removal is unlawful, and will be restrained by injunction. *Pulteney vs. Shelton*, 5 *Ves.*, 147. *Onslow's Case*, 16 *Ves.*, 173. That manure is not removable by the tenant, is well established in this country. *Fay, Judge of Probate vs. Muzzey*, 13 *Gray*, 55. *Lassell vs. Reed*, 6 *Greenlf.*, 222. *Stone vs. Proctor*, 2 *Chipm. Vt.*, 108, 114, *and* 115. *Goodrich vs. Jones*, 2 *Hill, N. Y.*, 142.

3. In this case not only is no custom authorizing a removal of manure set up, or proved, but the evidence negatives the existence of any such custom, and shows that the custom in Baltimore county, where the land in question lies, is all the other way, and in favor of the landlord. Therefore, even if the general rule of law had been different from what it is, the custom of the country denying the tenant the right to remove manure, would be considered as

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incorporated in the lease, and equivalent to an express stipulation. *Dale vs. Humfrey*, *Ell. Bl. & Ell.*, 1004. *Field vs. Lelean*, 6 *Hurls & Nor.*, 525. *Hutton vs. Warren*, *Mees. & Wels.*, 473. The land in question was leased for the ordinary purposes of husbandry, and if the lessees or those claiming under them, instead of pasturing a reasonable number of cattle upon it, choose to herd and feed upon it a much larger number, they cannot relieve themselves of the obligations of the tenancy, nor justify a breach in one respect by the pretence that upon the whole their use of the land will be an improvement of it, even if the facts bore out such an averment. For no tenant is permitted to excuse an act of waste by showing that he has in other respects benefitted the land to a larger extent. *Bullitt vs. Musgrave*, 3 *Gill*, 31. *French vs. Macale*, 2 *Dru. & War.*, 269.

II. A case of threatened *irreparable damage* is, however, abundantly made out by the proof. No one can doubt, upon reading through the evidence, that Gallagher, but for the restraint of the injunction, would speedily have reduced Mr. Shipley's fields to the same condition as he had reduced the Alms House land. An alteration of the character of the ground much short of this, and a far less considerable abstraction of the vegetable mould from the surface, would have constituted that kind of injury which, in the consideration of a Court of Equity, is classed as irremediable.

III. 1. As to exceptions founded on a supposed non-joinder or mis-joinder of defendants, it is well settled that on a motion to dissolve, the Court will not listen to an objection of mis-joinder of parties, where the party making the objection is himself without merits. *Lucas vs. McBlair*, 12 *G. & J.*, 16. *Campbell vs. Poultney*, 6 *G. & J.*, 94. *Tradesman's Bank vs. Merritt*, 1 *Paige*, 303. There is

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no evidence, however, that the suit is not properly instituted as to parties.

2. The appellant's exceptions to evidence, if sustained, could not affect the result. But there is nothing in them: Firstly, because the interrogatories in question are not in fact obnoxious to the censure; and secondly, because it is too late to start such an exception after the interrogatory has been suffered to be propounded without objection, and the evidence closed and returned. The objection—but formal at best—is waived, when the party having an opportunity to make it before the witness has answered, says nothing at the time when the fault could have been remedied, but allows the question to be put and the answer elicited. He cannot lie by, take the chance of a response favorable to himself, and then, when it is ascertained that it is against him, make the point that the question ought not to have been asked. The objection, in short, is properly an objection to the interrogatory, and not to the testimony under it, and should be taken at the proper period as an objection to the interrogatory. *Mechanics' Bank vs. Seton*, 1 *Pet.*, 307. *Sheeler vs. Speer*, 3 *Binn*, 130. *Strickler vs. Todd*, 10 *Serg. & Rawl.*, 63. *Woodman vs. Coolbroth*, 7 *Green*, 18. *Whipple vs. Stevens*, 2 *Frost, N. H.*, 224. *Wicher vs. Wicher*, 11 *N. H. Rep.*, 356. *Willey vs. Portsmouth*, 35 *N. H. Rep.*, 303. *Townsend et al. vs. Jeffrey's*, 24 *Ala. Rep.*, 335, 336. *Humphreys vs. Bradford*, 32 *Ala. Rep.*, 500. *Crowell vs. Western Reserve Bank*, 3 *Ohio N. S.*, 406. *Barrow vs. Rhinelander*, 1 *Johns. Ch. Rep.*, 559. *Williams et al. vs. Banks*, 5 *Md. Rep.*, 198. *Byrely vs. Staley*, 5 *G. & J.*, 432. *Nichols vs. Downing*, 1 *Stark.*, 81.

The practice in the English Chancery, of suppressing the answers on motion, is consistent with this principle, for there, the examinations being private, the opposite party until the publication of the evidence, has had no opportunity of seeing the interrogatories, and of course could

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not before object to the form of them. But in England the objection must be taken before hearing, and even if it prevail, an opportunity is given to the party to take the evidence over again. *Gresley Eq. Ev.*, 75, 197, 213, and note.

COCHRAN, J., delivered the opinion of this Court.

The professed object of the appellee in filing this bill was to stay irreparable injury and waste, which he alleges was being committed by removing manure from land of which he was the lessor; but we have been satisfied, by an examination of the record, that his real purpose was to secure the manure as an accretion or appurtenance to the soil of the leased premises. It is immaterial, however, on which theory the bill goes, for both present the question as to the right of property in the manure; and as the case must ultimately turn upon the decision of that question, we think it should be dealt with at once, without regard to any of the subordinate points considered in course of the argument.

It is settled by the general current of American as well as English authorities, that a tenant, under a farming lease or contract, has no right to remove from the premises so occupied, without an express stipulation to that effect, any manure made in whole or in part from the produce of the land. 5 *Ves.*, 147, 260, 261. 16 *Ves.*, 173. 13 *Gray*, 55. 6 *Greenlf.*, 222. 2 *Hill*, 142. 15 *Wend.*, 169. 19 *Ver.*, 379. 10 *Fost.* 558. In such a case, the manure is not regarded as a product of the land to which the tenant is exclusively entitled, but as ordure or compost resulting from the consumption or decay of those products, required by the land to repair the waste to which it has been subjected in producing the crops consumed; and it is for that reason that the law holds the manure in such a case to be an accretion to the land which the tenant cannot

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remove. This rule, it is insisted, applies to the present case, and in examining this proposition it will be necessary to refer with some care to the facts shown by the admissible evidence contained in the record.

The lease, exhibited by the appellee with his bill, is general in its provisions and terms; it says nothing of the mode in which the lessees were to use or occupy the demised premises; and they were clothed, in our opinion, with full power and right to occupy and use the land described in the lease for any lawful purpose not injurious to the reversion. It is true that the lease contains stipulations as to the condition in which the property is to be surrendered at the expiration of the term, but these provisions have no relation to the intermediate occupation, and of course raises no presumption as to the use to which the land was to be applied. The averment in the bill, of an understanding between the appellee and lessees that the land was to be used for depasturing cattle, does not affect the appellants here, nor can such an averment limit in any degree, so far as they are concerned, the legal effect and operation of the terms of the lease. Whatever the case was as between the immediate parties to the lease, it is clear that no mere verbal understanding between them could affect the rights of persons holding under the lessees without notice of it, but the appellee does not allege, nor does he contend, that these appellants entered upon the demised premises with notice of any such understanding. We think, by the true construction of the lease, that the appellants were not bound to use the demised premises for the purposes of husbandry alone, but that they were at liberty to occupy the same for any lawful purpose whatever.

The appellee alleges that the appellants had for some months before filing the bill, and at that time were occupying and using the land in question as a corral or pen for

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herding large numbers of cattle brought thither to be slaughtered for the use of the armies of the United States. This fact is admitted by the answer, and it abundantly appears from the proof, that the cattle there herded were fed with provender supplied altogether from sources foreign to the land; and that for the beneficial or economical use of it in that way, it was necessary from time to time to remove the manure deposited on the surface. It would seem impossible on this state of case to apply the rule insisted on by the appellee. The land furnished nothing for the support of the cattle, nor was it exhausted by cultivation or by the use to which it was applied; on the contrary the evidence shows conclusively, that it was constantly improving by accretions to the soil that could not be removed with the manure. The appellants were not occupying the land under a farming lease, and in using it for the purpose disclosed by the evidence, neither were injuring, nor could injure the interest or estate of the lessor. The rule governing the case of a tenant under a farming lease is founded upon facts and considerations wholly different from those shown by the proof here; and we think, as it cannot be applied to this case for that reason, that there is no substantial ground for disputing the appellant's right of property in the manner claimed by them. The appellee, however, further insists that the manure became so commingled with the soil of the land, that it was impossible to remove it therefrom without removing the soil. This presumption seems in its nature to be speculative rather than positive, for even admitting, as probably was the fact, that much of the manure was trampled in and commingled with the soil, it by no means follows that such as was not trampled in could not be removed from the surface without removing the soil. The evidence shows beyond question, that only such manure as remained on the surface, and capable of re-

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moval without injury to the land, was removed. How the removal of such manure could injure or affect the estate of the lessor is a matter somewhat difficult to discover. We admit that, while the appellants had the right of property in such manure as was not commingled with the soil, and the consequent right of removal, they were bound to exercise their right of removal with such diligent care and skill as would prevent injury to the land. We conclude, however, from a careful review of the testimony, that reasonable skill and care were exercised by the appellants in removing the manure claimed by them. The proof shows that the implement used for that purpose was constructed with especial reference to that end, and that it was nearly if not quite impossible, in using it, to inflict any injury whatever, in the way of removing the soil.

We are of opinion, looking to the facts and circumstances admitted and established by the evidence, that the Court below erred in refusing to dissolve the injunction, and will therefore sign a decree reversing the order appealed from, with costs to the appellants, dissolving the injunction and remanding the cause.

Order reversed, injunction dissolved, and cause remanded.

(Decided January 25th, 1866.)

ANTONIA M. L. WATERS, EXCTX. OF ANDREW G. WATERS, *vs.* JAMES S. WATERS, TRUSTEE, AND OTHERS.

WILLS, CONSTRUCTION OF: LEGACIES AND BEQUESTS, CONTINGENT AND VESTED.—A testator provided by means of a trust for the annual support of his widow during her life, and also during the life of his said widow for the support

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of his daughter M., and the support, maintenance and education of his minor children, out of the rents, dividends, income and profits of his estate, real and personal, which he devised to two of his sons and their heirs, &c., upon the trusts and for the uses and purposes limited in the will; and the surplus of said rents, &c., he devised "in trust that the whole of said surplus be divided annually amongst all my children who may be of the age of twenty-one years, or who may be married," &c. The will was made in 1857; the testator died in 1858, leaving a widow and eight children, of whom two were under the age of twenty-one years when the will was executed; one of these became of age before the death of the testator, the other some time after. Four were married when the will was executed. In 1859 one of the sons died, leaving a widow and children; another, one of the trustees, A. G. W., died in 1863, leaving also a widow and children. The said widow of the deceased trustee, having been appointed his executrix, and having qualified as such, filed a bill for an injunction to prevent such a distribution of the surplus rents, &c., in the hands of the surviving trustee as would exclude the estate of her husband from a participation therein, HELD:

That the children of the testator who were of the age of twenty-one years, or married, at the time of his death, took vested interests in their shares of the surplus income from his estates from that time; and that the shares of those who attained twenty-one years, or married after his death, became vested at the happening of either of those events, and that the share of A. G. W. survived to his personal representatives.

APPEAL from the Circuit Court of Baltimore City.

This is an appeal from a *pro forma* order of the Circuit Court of Baltimore City refusing an injunction. The only question in the case is as to the construction of a devise in the will of Freeborn G. Waters. The allegations of the bill and the portion of the will in controversy are set forth in the opinion of this Court.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

A. W. Machen and *R. J. Gittings* for the appellant.

1. The law favors the vesting of estates, for so to hold generally better accomplishes the purpose of the testator

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in the case of the death, before the time of actual enjoyment, of any object of his bounty for whose death, under such circumstances, he has not made express provision. 1 *Jarm. on Wills*, 726 *a*. *Barker vs. Barker*, 13 *Eng. L. & E. Rep.*, 173. *Ridgway vs. Ridgway*, 4 *Eng. L. & E. Rep.*, 108. If such were not the rule of construction, the hardship, as a learned Judge has said, would often be enormous. *King vs. Isaacson*, 17 *Eng. L. & E., Rep.*, 455, 457. At any rate, no rule is more firmly established, and contingency will not be imported into such gifts without a manifest necessity. No such necessity exists here. On the contrary, the just and equitable construction for which we contend is the obvious and rational interpretation, and the only one which is in perfect harmony with the other provisions of the will.

The gift in question is in the nature of an annuity. Subject to certain charges or deductions of a definite character, though variable in amount, the entire rents and profits for the term of the life of Mrs. Matilda Waters are given to the children who are twenty-one or married. The circumstance that, so long as some of the children are minors or unmarried, others may from time to time be let in, is immaterial, and cannot at all effect the quality of the gift as vested or otherwise. The gift is defeasible to the extent of the diminution of the dividend to be occasioned by the deduction of the share of the new member, and that is all. *See Blease vs. Burgh*, 2 *Beav.*, 227, *and see Ellis vs. Maxwell*, 12 *Beav.*, 104. *Oppenheimer vs. Henry*, 10 *Hare*, 441. Equally immaterial is it that the whole rents and profits are not given, but the rents and profits, less the payments requisite for certain other objects. A residuary devise, although the amount of it be uncertain until the prior payments are made, is never for this reason considered as contingent. It may turn

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out, and often does, that nothing is left for the gift to operate on, and yet it will remain all the while a vested interest. *Bolger vs. Mackell*, 5 *Ves.*, 509, 513. 1 *Jarm. on Wills*, 768. Just as certain as that the $800 a year and $500 a year are annuities, is it that the gift of the surplus of annual income resulting after the deduction of these or other charges, as the case may be, is an annuity. Stripped therefore of circumstances which are immaterial with respect to the question in hand, the case is that of an annuity, or what is exactly equivalent to an annuity, to each of the testator's children who shall be twenty-one years of age or married—an annuity, the term of which is the duration of the life of the widow.

Now, it is clear that where there is an annuity to A during the life of B, or a bequest of the interest of a bond or of a sum of money to A during the life of B, A has an interest which is not at all dependent on his own life, but is transmissible to his executor in the event of his dying before B. This was held by Lord HARDWICKE in *Savery vs. Dyer*, *Amb.*, 139, and had been previously decided in *Gifford vs. Goldsey*, 2 *Vern.*, 35, upon the authority of 1 *Rolle Ab.*, 831, *pl.* 5. *See also Eales vs. Cardigan*, 9 *Sim.*, 384. *Webb vs. Kelly*, *Id.*, 469. *Jones vs. Randall*, 1 *Jac. & Walk.*, 99. 1 Code, Art. 93, sec., 220.

II. a. It will be contended on the other hand, however, that this bequest should be construed, not as one entire gift, but as a succession of distincts gifts—each act of division marking a separate limitation dependent upon the particular state of things existing at the time of making it. But, in the first place, the gift is one, and not several. Just as the annuities of $800 and $500 are in the same clause treated in the aggregate, and directed to be deducted, so the whole income to accrue throughout the life of Mrs. Matilda Waters, out of which they are

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to be taken, is dealt with in its entirety. The annual division proceeds merely from the nature of the subject matter, in like manner as the two annuities would be discharged in annual payments. The provision for distributing the income annually, is not at the most so strong a circumstance, as a direction that the whole should accumulate and be payable at the death of the widow would be. And it is certain that such a modification of the existing clause would not prevent the gift from vesting in each child, from the time he should be found to be of the age of twenty-one, nor would it raise any question of a right of survivorship, without the addition of express words, such as "then living." *Blease vs. Burgh.*, 2 *Beav.*, 226. 1 *Jarm. on Wills*, 767. *Stretch vs. Watkins*, 1 *Madd.*, 253, (143.)

b. And secondly, if the construction sought to be put on the devise by the appellees were admissible, and the gift were thus broken up into so many separate legacies as years may chance to elapse before the death of Mrs. Matilda Waters, it could not avail to defeat the rights of the personal representatives of Andrew G. Waters. For wherever the postponement of the payment of any legacy, or of any instalment of any legacy, is referable to the circumstances of the estate, and not to circumstances personal to the legatee, the gift is vested. *O'Byrne vs. O'Byrne's Admr.*, 9 *Md. Rep.*, 512. *Snively vs. Beavans*, 1 *Md. Rep.*, 208, 222. *Spence vs. Robins*, 6 *G. & J.*, 507. 1 *Jarm. on Wills*, 756, 757. 2 *Wms. Excr.*, 1102. *Parkham vs. Gregory*, 4 *Hare*, 396. *Parker vs. Sowerby*, 21 *Eng. L. & E. Rep.*, 39.

The rule is that if the legatee be capable of taking, no postponement of the time of the payment will prevent his having a vested and transmissible interest. *Cousins vs. Shroder*, 4 *Sim.*, 23. *Thomson's Trust.*, 15 *Eng., L. & E. Rep.*, 498. *Hammond vs. Maule*, 1 *Colly*, 281.

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Such force is given to the rule in favor of vesting, that even where there is an express gift over—as to the children of the legatee in case he die leaving issue—such words are not allowed to make the gift itself contingent, but only to divest it in the case expressly mentioned, viz: the leaving of issue; in any other event the executor will succeed. *Parker vs. Golding*, 13 *Sim.*, 418. *Masters vs. Scales*, 13 *Beav.*, 60. *Ridgway vs. Ridgway*, 4 *Eng. L. & E. Rep.*, 108.

It is noticeable that the testator, in distinguishing amongst his children, makes the attainment of a certain age the sole criterion; they are to fall into one class or the other according as they shall have attained twenty-one or not; and he evidently has not at all in his contemplation, in respect of the income, the death of any of them as an event on which anything is to turn. Even where the gift in terms imports survivorship, Courts have not scrupled—the context permitting it—to construe survivors into others. But here no words of survivorship are employed, and there is no necessity for any such latitude of construction in order to give the same equitable effect to the devise. In the simple case like the present, of a gift restricted to persons who shall have reached a certain age, although the time of payment is postponed, it is always sufficient, for the vesting of the bequest, that such age had once been attained. *Clutterbuck vs. Edwards*, 2 *R. & My.*, 577. See also, *Leeming vs. Sherratt*, 2 *Hare*, 23. *Boulton vs. Beard*, 3 *De G. M. & G.*, 612. 27 *Eng. L. & E. Rep.*, 423, 424.

III. Our construction is greatly confirmed by the context.

1. Supposing the condition upon which Martha's enjoyment of her annuity of $500 depends to be fulfilled, by her ceasing to live with her mother, it cannot be doubted that

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her interest in this annuity would be vested. Yet the testator blends with the clause in question, the declaration that "in dividing said surplus, the allowance of five hundred dollars per annum to my said daughter, Martha K. Waters, shall be taken and computed as a part of her portion thereof." Now, if part is vested, it reasonably follows that the whole is vested; and if Martha's share be vested, the share of the other children limited in one and the same clause must be vested. *Kidd vs. North*, 27 *Eng. L. & Eq. Rep.*, 3 *De G., M. & G.*, 954.

2. Upon what ground could it then be pretended that the several interests of the children in the income were not vested? But what essential element was wanting when Andrew died? All the children were married—all of age. The widow's allowance was not limited to any precise amount, yet the means of determining it was defined in the will. What conceivable object could there be in affecting the interests of the several children with contingency?

3. In dealing with the advances made, the testator thus makes them vested portions of the shares which the sons are to take in the final division, and indeed seems to imply that their whole shares in the *corpus* are vested, although he had previously directed that the division of the *corpus* should be made amongst the children living at the time of making it and the descendants of deceased children. Andrew's issue cannot, under the will, take that part of what would have been their father's whole distributive share, which has been already advanced and paid to him in his lifetime. Except as to any excess over his proportion of the estate, no part of these advances is ever to be returned. They have vested absolutely and forever—as well in enjoyment as in interest.

4. This kind and wise-judging parent, who sought to give these children, whom he desired should immediately

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establish themselves in life, the means of so doing, never could have intended that his bounty should be snatched away from the wife whose marriage to his son he made a sufficient ground for letting him in to share in his estate, at the instant that she was made a widow, or that his son's tender and helpless orphan children, whose participation in the capital of his estate, when the division of it shall be made, he has carefully provided for, shall until then be kept destitute of all means of support.

5. As to the income there was no occasion for special limitations. The gift is simple and direct to a class of persons who are exactly defined—one of whom the complainant's intestate was. The law and the common rules of construction do the rest, and accomplish with exactness sufficient for the case the general intent which speaks out of the whole will, to provide equally for all his children and their families. That provision in the will which requires the shares of "the rest of the children" to make good any deficiency of Martha's share in the final division, tends to strengthen the view that the devise of the *corpus* gave vested interests to the children, respectively.

Finally, if the children who are over twenty-one have not vested interests in the income, then, in case of the decease of all the children before the widow—an event the possibility of which the testator himself recognized in his dispositions in regard to the capital, a complete intestacy would result as to all of the income not appropriated to the widow's own use. If all should die save one—for example, the trustee, Mr. James S. Waters—this one son would enjoy the whole residuary income of this large estate during the lifetime of the widow. A construction capable of working such consequences cannot be in accordance with the testator's intention.

Thomas S. Alexander for the appellees.

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In support of the order of the Court below, from which this appeal is taken, the appellee, James S. Waters, will insist:

1. That the question at issue is simply whether the appellant, as executrix of a deceased child of the testator, Freeborn G. Waters, is entitled to share in the distribution of the surplus income, which is directed to be made annually during the life of the widow, amongst the "children" of the testator? Now "children," in the absence of any thing indicative of a contrary intention, includes the descendants in the first degree, and will not embrace grandchildren or others in a remote degree. *Radcliffe vs. Buckley*, 10 *Ves.*, 195. *Ld. Oxford vs. Churchill*, 3 *V. & B.*, 69. And *a fortiori* children will not include the executor of a deceased child, unless it can be shown that the child in his life time had a vested interest in the subject, which devolved as property or assets on his personal representative. The ground work of the argument on the other side must therefore be that the children of the testator in being at the time of his death acquired vested interests in the surplusses of income to accrue during the life time of the widow.

2. There is, and can be no evidence in regard to the value of the testator's estate, or of the pecuniary circumstances of the children deceased, at the times of their respective deaths. In reference to the question of interpretation, it is immaterial whether the testator's estate was or is large or small? Whether the families of deceased children are in affluent or straightened circumstances? Or whether the child deceased has left any estate or family behind him? The appellant does not claim as widow or as guardian by nurture for her children; she claims as executrix; and any portion of the fund which may be allotted to her will become assets for the payment of her late husband's debts. And treating the question as one of intent, it is simply

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this: Did the testator, in the distribution of any portion of his estate, intend to prefer the creditors of a deceased child, to his surviving children ?

3. The question is one of pure intent. And the burden is on the appellant, like all other actors, to show that the testator intended she should share in the distribution. It is insisted that no such intent is evidenced.

1st. There is no gift independent of the direction to distribute.

2nd. The distribution is to be made by the widow, and not by the executors or trustees. They are required to pay over the entire income as it accrues to the widow; and by such payment over, they acquit themselves of all further responsibility in respect of the fund.

3rd. The distribution is to be made of any surplus of income which may remain at the end of any year, after providing thereout, at the discretion of the widow, for her own comfortable support, and for the maintenance, support and education of the minor children.

Cases are to be found in which equity has intimated its power to enforce on the widow the duty of providing for her infant children; yet it seems to be conceded that the latter have no vested interest in the fund which can be ascertained and separated by the Court to be administered under its direction. And it is believed no case can be found in which parties circumstanced as the adult and married children are, have been supposed to be entitled to the aid of equity, to prevent waste or injudicious expenditure of the income, or to compel the widow to render an account of the manner of her disposition thereof. She may consume the whole if she pleases to do so. The existence of a surplus at any moment is accidental.

It depends on her pleasure whether there shall be less or more. It is submitted that it cannot be safely affirmed

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that there is a right to participate in any surplus thus contingent, which vests at any moment prior to the period fixed for distribution thereof.

4th. The distribution is to be annually made amongst the children who may be of twenty-one years, or who may be married; that is, amongst children who, at the moment of distribution, are in existence and clothed with the prescribed attributes. It is conceded by the appellant, that the vesting does not take place until the period appointed for the first distribution.

But the true alternative is between the vesting of the right to share in the distribution of any year's surplus, at the end of the year; or the vesting of the same right immediately after the testator's death. And if the latter epoch is adopted then these results will follow: a child dies after the death of the testator, in its infancy and unmarried, its representative must share in the distribution, at the least from the period at which, if living, it would have attained the full age; and next, if a child had died in the testator's life time, leaving issue, such issue would be excluded altogether from distribution. These consequences are suggested as showing that upon the hypothesis contended for by the other side, the disappointment of the testator's supposed intent will be just as probable as if the opposite hypothesis should be adopted.

5. The income is to arise from real as well as personal estate, and if the interest of the children, on any supposed surpluses, are to be deemed to be vested and capable of devolution on the proper representative of any deceased child, then the right to so much of the surplus, as was derived from real estate, would descend on the heir-at-law, whilst the right of the personal representative would be limited to so much of the surplus as was derived from personal estate. Now, it is submitted, that the discrimination could hardly

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be made by the trustees;—it could not be made by the widow who is charged with the duty of distribution. *Barham vs. Mee.*, 1 *R. & My.*, 631. *Crockett vs. Crockett*, 2 *Phill.*, 553. *Tawney vs. Ward*, 1 *Beav.*, 563. *Gibbs vs. Tart.*, 8 *Sim.*, 132.

No aid can be derived by the appellant from the subsequent clauses of the will. On the contrary, the dispositions of the principal estate are altogether contingent. The children have no power of disposition over their parts of the principal estate at any time before the period of distribution thereof. And in the event of the death of a child leaving issue, such issue is to take in the place of its parent. Is it probable, then, that the testator intended to give to his children an interest in the accidental surplusses of income in a form which would render it liable to execution, or in the hands of executors would become assets for the payment of debts?

A. W. Machen, for the appellant, in reply.

1. The trust to distribute is to be performed by the *trustees*, and not by the widow. This is shown by the original declaration accompanying the devise to the trustees that they are to hold the whole estate upon the trusts thereafter to be limited, of which this is one; by the clause providing for the annuity of $500, to Martha K. Waters, which the trustees are directed to pay out of the income, which would be impossible upon the hypothesis set up by the appellee's counsel, according to which, the whole income would be in the hands of the widow; by the structure of the clause in question itself, which exactly follows the form used in other parts of the will in defining the duties of the trustees in the several cases provided for; by the fact that in case of the second marriage of the widow, and consequent payment of $800 a year to her, (one of the cases

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covered by the clause,) the *trust* must be performed by the trustees; by the absence of any declaration that the widow is to perform it, the nature of the duty, and in short, the whole plan of the will and the necessity of the case.

2. The surplus or residue of income is a thing as certain in its nature or as capable of being made so, as any other subject of disposition in the will. The testator has himself defined it, and given it both certainty and importance by expressly providing for its division and payment.

WEISEL, J., delivered the opinion of this Court.

The question in this case arises upon the will of Freeborn G. Waters, and on that clause which disposes of the surplus income of his estates, during the life of his widow, viz: whether the share of an adult child in this surplus income, continues and is transmissible after his death, during the widow's lifetime, or whether it ceases at such death.

The testator provided, by means of a trust, for the annual support of his widow during life, and also during the life of his widow, for the support of his daughter Martha and the support, maintenance and education of his minor children, out of the rents, dividends, income and profits of his estate, real and personal, which he devised to two of his sons, their heirs, &c., upon the trusts and for the uses and purposes limited in the will. As to any surplus of said income, rents and profits that might remain after the application of the necessary portion to the support of his wife, his daughter Martha and minor children, as he had provided, he devised as follows:

"In trust that the whole of said surplus be equally divided annually amongst all my children who may be of the age of twenty-one years, or who may be married," with a further direction in regard to an annuity to his daughter Martha in a certain event, as set out in the will.

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The will was made in June, 1857, and the testator died in July, 1858, leaving eight children; all over twenty-one years of age at the time of the execution of the will, except two. One of these became of age before the death of the testator, the other afterwards. Four were married when the will was made.

In the summer of 1859, one of the sons, John Summerfield Waters, died, leaving a widow and several children.

In August, 1863, Andrew G. Waters, another son, and one of the trustees and executors, died, leaving a widow and four children; the widow having been appointed his executrix by his will, and having qualified as such.

A considerable surplus income arose every year since the death of the testator, Freeborn G. Waters, for distribution. And a large surplus was in the hands of the surviving trustee for the year preceding the filing of the bill in this case in September, 1865.

These are the material allegations of the bill of complaint.

The suit is by the executrix of Andrew G. Waters, to prevent by injunction such a distribution of the surplus income in the hands of the trustee, as would exclude the estate of her husband from a participation in the fund.

It will be observed that the distribution by the will is an annual one; words of futurity are used; and the objects to take are children of the testator, of full age or married; without any words limiting a share to the representatives or descendants of any child who might die during this course of annual distribution. It is this feature that produces the difficulty in the case. On the one hand it is contended that only those of the children take every year, who are at the time of the distribution in existence and answer the description in the will; whilst on the other it is insisted, as the true construction, that

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the interests in this portion of the income vested in the persons described, and were transmissible in the case of any one who might die during the lifetime of the widow.

The intention of the testator is of course the matter to be inquired into, and, as in all cases of doubt or difficulty, we must avail ourselves of settled rules of construction that are applicable and will aid in the examination.

The first and main inquiry is, whether the shares of the surplus income became vested in the children described at the time of the testator's death, or when they fell within the class indicated in the will. The subject of the bequests, it is true, is not a part of the integral estate—not the residue of an estate, after other bequests made. It is the surplus or residue of an annually accruing fund from rents and profits of the entire estate, in the hands of trustees collected by them, and held annually for distribution, after providing for the support of the widow and minor children and his daughter Martha, during the widow's life. There can be no doubt that in the case of a residue of personalty, or in the case of an annuity during the life of another, the legacy would vest and survive to the personal representative in the event of the death of the legatee before the time of payment, unless a different intention was expressed or conveyed by the will. So if the fund were directed to accumulate and to be distributed and paid at a future day or upon a certain event, and the legatee should die before that time. The rules of construction favoring the vesting of estates, and to prevent intestacy in the case of residuary bequests, would apply in those cases according to all the authorities. And the Court cannot perceive why the same rules should not govern the construction in this case. The same reasons apply; the same motive to do equal justice to all the objects of the testator's bounty; and no intention of the

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testator to the contrary is contravened by the application of the rules. The rule for favoring the vesting of estates is laid down by Mr. Jarman in his excellent treatise on wills, in language so precise and yet so full, as clearly to embrace the bequests under consideration. It is this: "The law is said to favor the vesting of estates, the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of the gift, immediately on the instrument taking effect, or so soon afterwards as such object comes into existence or the terms thereof will permit." As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person *in esse* simply, (*i. e.* without any intimation of desire to suspend or postpone its operation,) confers an immediate vested interest.

If words of futurity are introduced into the gift, the question arises, whether the expressions are inserted for the purpose of protracting the period of vesting, or point merely to the deferred possession or enjoyment. 1 *Jarm. on Wills*, 726. See also, *Gifford vs. Goldsey*, 2 *Vern.*, 35. *Eales vs. Earl of Cardigan*, 9 *Sim.*, 384. *Webb vs. Kelly*, *same*, 469. *Leeming vs. Sherratt*, 2 *Hare.*, 23.

This construction is in harmony with the other provisions of the will and the general intent of the testator as shown on its face. His declared purpose was that his estate, as it existed at the time of his decease should remain unimpaired during the life of his wife. This he devised in trust, directing the annual income, rents and profits from it should be first applied every year to the support of his wife and minor children, and his daughter Martha, during the life of his widow, with a provision for an equal annual distribution of the surplus among his adult or married children. The alternate provision for his daughter Martha of five hundred dollars *per annum* out of

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said rents and profits, in case she ceased to live with her mother, and the direction that in the division of the surplus this allowance or annuity should be taken and computed as part of her portion of said surplus, manifest a clear intention that these bequests to the adult children should vest. She was one of that class, and the legacy of five hundred dollars *per annum* to her is clearly a vested legacy, and yet it constitutes a part of the surplus income to which she as one of the children of full age is entitled. If a part be vested, the whole is in that condition; and if one takes a vested interest out of the surplus, the others of the same class taking equal shares out of the same fund and in the same clause, take vested interests likewise. At the death of the wife the estate, real and personal, is to be equally divided among all his children then living, and the children and descendants of any deceased child, they taking the share of the deceased parent. These and all the other provisions in the will, together with his knowledge of the condition and wants of his family, the near approach to full age of his only two minor children, the marriage of four of his children, the vicissitudes of life exposing their offspring to orphanage and dependence, if not to want, lead to the conclusion that the testator did not intend that these bequests of the surplus income should be contingent, and dependent, as to any of the described legatees, upon his continuance in being during the life of the widow.

We are therefore of opinion that the children of Freeborn G. Waters, who were twenty-one years of age or married at the time of his death, took vested interests in their shares of the surplus income from his estates from that time; and that the shares of those who attained twenty-one years or married after his death, became vested at the happening of either of those events; and that the share of

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Andrew G. Waters who has died, survives to his personal representatives.

The order of the Court below refusing the injunction prayed for will be reversed, and the cause and original papers remanded with instructions to the Circuit Court of Baltimore City to grant an injunction in conformity with this opinion and decision.

Order reversed and cause remanded.

(Decided January 27th, 1866.)

The York County Bank of Pennsylvania *vs.* Meyer Stein and others.

Principal and Agent: Contract.—The law is well settled, that the principal is personally responsible in all cases of contracts made by an agent within the scope of his authority; and this is not varied by the fact that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit was given to the agent.

The circumstance, that the name of the principal was not disclosed at the time of the contract, does not determine the election of the plaintiff to look to the agent alone for the fulfillment of the contract. The principal is notwithstanding answerable when discovered.

And such is the law with regard to a plaintiff principal who contracts by an agent. If the agent contracts in his own name without disclosing the principal, either the agent or the principal may sue upon the contract; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the principal as if the agent had been the contracting party.

In all cases of contracts by agents without disclosing their principals, the Courts in affording remedies will look to the substantial parties in interest, in order to avoid circuity of actions; saving however to the defendant any rights which he may justly acquire as against the plaintiff by the course of dealing anterior to the disclosure, either with the agent of the plaintiff or his own agent.

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The principal will not be made personally liable if in the intermediate time he has settled with his agent without any suspicion of his own personal liability, or if he would otherwise, without any default on his own part be prejudiced by being made personally liable.

In such cases it is essential that the plaintiff should in some way have either deceived the principal or induced him to alter his position and account towards his agent before he is deprived of his remedy against the principal.

It is now settled that the simple fact that the principal has paid his agent the funds with which to pay the plaintiff, does not deprive the plaintiff of his right to look to the principal if the agent fail to pay over according to his orders.

——: ——: PROVINCE OF COURT AND JURY.—In an action at law where the question of agency is involved, if there is evidence to establish such agency, the jury are the exclusive judges of its weight.

APPEAL from the Court of Common Pleas for Baltimore City.

This was an action instituted by the appellant to recover a balance due on a loan of $3,000 made by it to the appellees on the 11th of March, 1861, payable in 90 days.

Exception.—At the trial of the cause, the plaintiff, to maintain the issues on its part joined, proved by George Small, a competent witness, that a few days before the transactions out of which this case arose, the president of the plaintiff, who was the father of the witness, and who lived in York, Pennsylvania, being then in the City of Baltimore, called, at the suggestion of the witness, at the office of several brokers, in company with the witness, and among others, at that of J. R. McGinn, and stated that the plaintiff had money to lend on good collateral security, and inquired if said broker knew of any one who wished to borrow, and that said McGinn, in reply to the inquiry made of him, said that one of his customers, then present, would take said loan, and in the presence of said customer named the collaterals which he had to offer, and that the president replied that he was not authorized to

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make said loan on said collaterals without the authority of his board, and promised on his return home to telegraph the witness, Small, on the subject; that he did so telegraph said witness, and that said loan was not made; that said McGinn, in a few days after, called on the witness and inquired whether or not the plaintiff still had any of said money to lend, and stated that one of his, the said McGinn's customers, desired to borrow $3,000 thereof, on $5,000 of Virginia bonds as collateral security; that said witness communicated said proposition to the president of the plaintiff, and in reply received a letter, which he had diligently searched for, but was unable to find, authorizing him to accept said proposition, and enclosing him for that purpose a check for the amount of the loan after deducting the discount; that when witness received the check and the authority of the bank to make the loan, he notified McGinn, and closed the transaction he thinks in McGinn's office; that the loan was of $3,000, for 90 days on the security of $5,000 Virginia bonds; that witness handed McGinn the check, and received from him the bonds.

The plaintiff then produced the paper marked A, which is as follows:

"We have this day received of Mr. George Small the sum of three thousand dollars ($3,000) returnable on 11th day of June next. And we have deposited in their hands, as collateral security for the payment of the same, the following securities, viz: $5,000 Virginia bonds, viz: No. 11,297, $1,000; No. 11,296, $1,000; No. 11,298, $1,000, No. 11,303, $1,000; No. 11,302, $1,000; with the understanding that if the said loan is not promptly paid, according to agreement, they are authorized, without further notice, to sell the said collaterals for the purpose of satisfying the same, any excess or deficiency to be paid or

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received by us, as the case may be. We also agree that a satisfactory margin shall be kept up.

"J. R. McGinn & Co."

Baltimore, March 11, 1861.

The witness then stated that the paper produced was the agreement entered into between him and McGinn; that the words "we also agree that a satisfactory margin shall be kept up," were not then in said paper, but were, several days after, added thereto at the request of the witness; that witness went to McGinn and asked him to add those words, saying that witness had made the same agreement in other cases; that McGinn at once consented, and added them; that nothing had been said between them about margins when the agreement was originally made and signed; and that on the 11th of March, 1861, at the time of receiving said check, the said McGinn also delivered to the witness, Small, the Virginia bonds described in the paper marked "A."

And the said witness further testified that after the troubles of the 19th of April, said bonds began to decline, and said witness called on McGinn for a margin, and again, a few days after, for another margin, and in response to said calls received from him $500 on the 22nd of April, and that he never received from him any other sum; that the $500 received by McGinn was sent by witness to the bank soon after its receipt, (communication with York having been interrupted for some days after the 19th of April,) and that when sent, witness informed the bank that it was the amount of a margin he had called for on the loan in question, and it was credited by the bank; that as soon as he heard that McGinn had failed, the witness fearing that inasmuch as he had called for two margins and received only one, McGinn might have obtained from his principal more than he had paid over to the witness, went to the office of McGinn to

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inquire who the principal was, and learned from McGinn's clerk that the defendants were the principals; that this was after the receipt of the $500; that up to that time the witness knew that McGinn was acting as a broker for some one else, but did not know for whom he was so acting; that witness then went to the counting-room of the defendants, and asked if said bonds were theirs, and if said loan was effected for them; to both of said inquiries they replied "yes;" that witness asked how many margins they paid, and they replied, "two;" that witness informed them that he had received but one; and that he notified the defendants when the loan became due, and they tendered him $2,000.

The correspondence between the parties preliminary to the sale of the bonds was then read in evidence, and the defendants' counsel admitted that said bonds were sold at the stock board in the customary and most advantageous way, for the amount indicated in the account sales thereof, which account was offered in evidence.

On cross-examination the witness proved that he had known McGinn for some considerable time; they were neighbors, and had known him three or four years as a stock, note and bill broker, and had never known him in any other capacity; that he had had a good many transactions with him, and had given him stocks to buy and sell, and had bought paper of him; but had never had any other transaction with him in which the plaintiff was concerned; that the witness had, once or twice before, bought paper and lent money on collaterals for the plaintiff; that he had bought the paper from Messrs. William Fisher & Son, brokers; that witness called on McGinn for the first margin, probably for the second, before the 19th of April —he was not certain about the date; that he called first for $500, and it was paid on the 22nd; that about the 19th, he called for the second margin but did not receive any-

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thing from McGinn on account of the second call; that the witness called on McGinn to go to his, McGinn's principals, and make the demand for the margins; that witness did not then know or inquire who the principals were; that McGinn requested the witness to make the demand in writing, and he complied; that witness's impression was, he told McGinn to go to his, McGinn's, customers or principals, and make the demand; that witness's understanding was, that McGinn was to bring the money to him; that about the 26th of April, he went to McGinn's office to learn why the money had not been put up (this was the day after McGinn's failure); that he then asked for McGinn's principal (this was the first time he made the inquiry, and the first information he had who were his principals); that the net proceeds of the sales of the bonds were credited by the bank, and also the $500 received from McGinn; and that he thinks he mentioned to the president of the bank that he had added the words authorizing him to call for a margin.

On being recalled, the witness said that he gave McGinn no authority to make said loan, nor any other authority in connection therewith, but himself acted as agent of the bank; that the $500 received by McGinn was sent by witness to the bank soon after its receipt, (communication with York having been interrupted for some days after the 19th April,) and that when sent, witness informed the bank that it was the amount of a margin he had called for on the loan in question, and it was credited by the bank; that witness had been in the habit, from time to time, of doing business for the bank in Baltimore; that he recollects buying notes for them, and is under the impression that he made another loan on collaterals for them; that when he wrote to his father about this transaction, he told him a broker had offered to borrow $3,000 on $5,000 Virginia bonds, and asked him if he would make the loan,

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and in reply he received the check, and the bank's authority to lend it.

The defendants' counsel then produced, and showed to the witness the following papers:

"*Messrs. J. R. McGinn & Co.:*

"GENTS.—I hereby call a margin of 10 per cent. on the $5,000 North Carolina 6's, on which I loaned you $3,000, March 11th. GEO. SMALL.

" Balto., April 17th, 1861."

"*Messrs. J. R. McGinn & Co.:*

"GENTS.—Please pay twenty per cent. on the $3.000 loan on Virginia 6's; this is additional to the 10 per cent. already called. Oblige GEO. SMALL.

" Baltimore, April 20th, 1861."

And the witness identified the said papers as those he had written and delivered to said McGinn, and said that the words North Carolina bonds, mentioned in one of them, were used by mistake for the Virginia bonds, about which he had been testifying.

The defendants then, to maintain the issues on their part joined, proved by J. R. McGinn, a competent witness, that he was, throughout the year 1861, a broker, engaged, in the name of J. R. McGinn & Co., in negotiating loans for other persons, and as such had a regular place of business; that he did not remember ever to have had with the witness, Small, as the agent of the plaintiff, any other transaction than that out of which this case had arisen; that after learning from the president of the bank, in the manner testified to by Small, that the plaintiff had money to lend, a gentleman came into his office and told him that he thought the defendants wanted the money; that he did not think he was at that time acting as their broker in any other matters; before going to the defendants, he went to Small to know if the latter had any of the money which

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had been referred to in their former interview, as testified to by Small; that the latter promised to write to the president of the plaintiff, and ascertain whether or not it still had any of the money to lend; that in the meantime the witness went to the defendants and told them he thought he would get some money for them, if they wanted it, and would let them know the next day; that after they told witness that they were willing to borrow $3,000 on $5,000 of Virginia bonds as collateral security, the witness went to Small and reported that one of his (witness's) customers would take said loan on said terms; that on the 11th March, 1861, George Small handed to the witness the check for $2,980.83, referred to in Small's testimony, and the witness at the same time handed to Small the Virginia bonds referred to in Small's testimony, which bonds he had received from the defendants for that purpose, and signed and delivered to him the paper marked "A," also referred to by him; that the words "we also agree to keep up a satisfactory margin," were not then on said paper, but were, several days after, added thereto, at the request of Small, without consultation with the defendants. On the 11th of March, 1861, the following counterpart thereof, marked B, was signed and delivered to the defendants;

"We have this day advanced to Messrs. Stein Bros., the sum of three thousand dollars, ($3,000,) returnable 11th day of June next. And they have deposited in our hands, as collateral security for the payment of the same, the following securities, viz: $5,000 Virginia bonds, viz: No. 11,297, $1,000; No. 11,296, $1,000; No. 11,298, $1,000; No. 11,303, $1,000; No. 11,302, $1,000.

{'$496.40, and in cash rec'd April 18th, as additional margin.
'$500.00, " " " 22nd, " "}

F. HARDESTY.'

"With the understanding that if the said loan is not promptly paid, according to agreement, we are authorized,

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without further notice, to sell the said collaterals for the purpose of satisfying the same; any excess or deficiency to be paid or received by us, as the case may be.

J. R. McGinn & Co.

"Balto., March 11th, 1861."

That the credits of $496.40 and $500, endorsed on said paper, were put there by witness' clerk, on the day said sums were paid to witness by defendants, as stated; that at the time of delivering this paper to the defendants, the witness paid them the proceeds of the check he had received from Small, less a quarter per cent. commissions, charged the defendants by the witness, for negotiating the loan for them; and that neither Small nor the plaintiff paid him any commissions. The witness then proved the genuineness of the following letters, written by him to the defendants:

"*Messrs. Stein Bros.:*

"Gentlemen:—We have been called upon to pay up a margin of 10 per cent. on loan of $3,000, made by us for your account on 11th March last, on $5,000 North Carolina 6 per cent. bonds. You will please respond accordingly.

"Yours, respectfully, J. R. McGinn & Co.

"Baltimore, 17th April, 1861."

Baltimore, 20th April, 1861.

"*Messrs. Stein Bros.:*

"Gentlemen:—We have been directed to call an additional margin of twenty (20) per cent. on loan of $3,000 Virginia bonds. Yours, respectfully,

"J. R. McGinn & Co."

The witness further proved, that in response to the first letter, the defendants paid him, on the 18th of April, $496.40; that they calculated what sum then paid would be equivalent to $500 at the maturity of the loan, and paid the above mentioned sum as such, preferring to pay it in

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that way, and that he never paid that to Small; and that on the 22nd of April the defendants paid the witness $500 more, which witness on the same day paid to Small.

On cross-examination, the witness testified that the first time he went to Small in reference to the loan in question, he told him that one of his, the witness's, customers would take $3,000 on $5,000 of Virginia bonds as collateral security; that at the time of paying the money, the proceeds of the check he had received from Small, to the defendants, he told them they were safe, that their bonds were in the custody of the plaintiff, and that the money paid them was the plaintiff's money—at all events, he was perfectly certain he told them so before any demand was made for a margin; that he thinks he stated to the defendants that he got the money from George Small, who was acting as agent for the plaintiff; that it is not customary to tell the borrower who the lender is, but in this case, as only six per cent. interest had been charged, he did inform the defendants; that he did not, however, inform the plaintiff who was the borrower; that the first margin was paid on the 18th of April; that the troubles of the 19th and 20th then ensued, which interrupted business and involved the witness in embarrassments, which rendered him unable to pay to Small what he had received.

The said witness also proved that he had received from the defendants the bonds mentioned in the papers marked "A" and "B," for the purpose of borrowing for them $3,000 thereon, as collateral security.

The defendants then proved by the witness, McGinn, and by Pittman, another broker, that they invariably charged the lender commissions for loans, without reference to the person by whom they were employed, and they so understood the universal usage of brokers to be, unless there was some understanding to the contrary.

And the plaintiff proved by Martin Lewis, that he is a

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broker, largely engaged in negotiating loans, and familiar with the usage of brokers; that the invariable usage, in the city of Baltimore, is for the broker to charge the party by whom he is employed, whether borrower or lender, with commissions for effecting loans, unless there is a previous understanding to the contrary.

And thereupon the plaintiff offered the following prayer:

The plaintiff, by its counsel, prays the Court to instruct the jury, that if they believe from the evidence in the cause that the President of the plaintiff, in company with the witness, George Small, called at the office of several brokers, and among others, that of J. R. McGinn, and stated that the plaintiff had money to lend on good collateral security, and inquired if said brokers knew of any one who wished to borrow, and that the said McGinn, in reply to the inquiry made of him, said that one of his customers, then present, would take said loan, and in the presence of said customer named the collaterals which he had to offer, and that the president replied that he was not authorized to make said loan on said collaterals without the sanction of his Board, and promised, on his return home, to telegraph the witness, Small, on the subject, and that he did so telegraph said Small, and that said loan was not made, and that said McGinn afterwards called on the said witness, Small, to know whether or not the plaintiff still had any of said money to lend, and stated that one of his, the said McGinn's customers would borrow $3,000 thereof, on $5,000 of Virginia bonds as collateral security, and that said Small communicated said proposition to the president of the plaintiff, and received, in reply, a letter authorizing him to accept said proposition, and enclosing him, for that purpose, the check for $2,980.83, which has been offered in evidence, and that the said Small, on the 11th March, 1861, handed said check to said McGinn, and that the same was paid on presentation, and that said McGinn, in

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receiving said check, delivered to said Small the Virginia bonds mentioned in the paper marked "A," which has been offered in evidence, and that said bonds had been entrusted by the defendant to the said McGinn, as a broker, for the purpose of borrowing thereon, as collateral security, the said money for them, and that the said McGinn, at the time of receiving said check, also signed and delivered to said Small the said paper marked "A," and that the words "we also agree that a satisfactory margin shall be kept up," were not then on said paper, but were, several days after, added thereto by said McGinn, at the request of said Small, and on the 11th of March, 1861, the said McGinn paid to defendants the proceeds of said check, less the commissions charged by him to them for negotiating said loan, and at the same time signed and delivered to them the paper offered in evidence by them, marked "B," and that the said McGinn informed the defendants, before they had paid anything on account of said loan, by way of margin or otherwise, and before any demand for a margin was made, that they were safe, because their bonds were in the custody of the plaintiff; that the money paid to them was the plaintiff's money, and that he had procured it from Geo. Small, who was acting as the plaintiff's agent, and that during all of said transactions the said McGinn was a broker in the city of Baltimore, engaged as such in the name of J. R. McGinn & Co., in negotiating loans for other persons, and that the several letters dated respectively the 10th, 11th, 13th and 14th of June, 1861, were on the dates thereof, respectively, received by the parties to whom they were addressed, and that the said Small, on the 14th of June, 1861, placed said bonds in the hands of William Fisher & Son, stock brokers, for sale, and that the same were in good faith, in the customary and most advantageous way, sold at the Stock Board for the amount indicated in the account sales thereof, marked "C," then the plaintiff

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is entitled to recover in this action, and the defendants are not entitled to be credited as against the plaintiff with any money paid by them to the said McGinn, and not paid by him to the said Small.

The Court (KING, J.) rejected said prayer, and verbally instructed the jury that the defendants were entitled, as against the plaintiff, to be credited with all the money paid by them to McGinn, whether paid over by him to Small or the plaintiff, or not, if the jury believe the facts stated in the foregoing bill of exceptions. To which said ruling of the Court, rejecting his said prayer, the plaintiff excepted, and the verdict and judgment being for the defendant, appealed.

The cause was argued before BOWIE, C. J., and GOLDSBOROUGH, COCHRAN and WEISEL, J.

S. Teackle Wallis and *John H. Thomas* for the appellant argued.

1st. That Small and McGinn, both being agents, and so known to each other, had no right to make the concontract in their own names, and the rights of the parties to this cause were precisely the same as if the principals had themselves negotiated the loan without the intervention of agents. *Story on Agents, sec.* 28.

2nd. That the appellant was entitled to sue, either on the implied *assumpsit* arising from the ownership of the money or on the express contract, notwithstanding its having been made in the agent's name. *Higdon vs. Thomas*, 1. *H. & G.*, 153. *New Jersey Steam Nav. Co. vs. Merchants' Bank*, 6 *Howard*, 378. *Ford vs. Williams*, 21 *Howard*, 289.

3rd. Even if credit was given by Small to McGinn, although he knew that McGinn was acting as a broker, he did not know for whom he was so acting, and the

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undisclosed principal can, when discovered, be sued. *Henderson vs. Mayhew*, 2 *Gill*, 408.

4th. The appellees were not entitled to credit for any payments made to McGinn after they knew that the appellant was a principal; the proof is that they were so informed when they received the money, long before they made any payment, and were then told that Small was the appellant's agent. Any payment subsequently made by them to McGinn was at their own risk. 6 *Howard*, 381.

5th. Small was only an agent to consummate the loan on the terms which had been proposed and accepted. That done, he was *functus officio*. He had no right to alter the contract after it was made so as to authorize a call for margin. He was not entitled to receive the money even when it was due, still less to receive a payment in advance, still less to authorize any one else to do so; and the appellant was not bound by his call for a margin, except as to the $500, which it received. *Story on Agency*, *sec.* 109.

6th. If Small's agency was more extensive he had no right to delegate his trust to any one else. The bank would not, therefore, be chargeable with the money paid to McGinn, even if Small authorized him to receive it. But it is clear he gave no such authority. He called on McGinn for margins, which McGinn had contracted to furnish; McGinn acted throughout as the agent of the appellees, and they have no right to shift upon others the loss resulting from their misplaced confidence.

7th. The contract between Small and McGinn, before it was altered by them without authority from the appellant, gave Small no right to call for margins. The contract between McGinn and the appellees gave McGinn no right to require any. The appellees recognized no such right. Instead of paying the margin called

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for they made a payment in advance on account of the loan. This was the payment which McGinn appropriated, and about which the controversy exists. It is clear that, even if McGinn had been the agent of the appellant, he had no right to receive such a payment, and the appellant is not bound thereby.

8th. The fact of the appellees having paid McGinn for negotiating the loan shows that he was their agent. If not clearly so, there was, at least, evidence from which the jury was entitled to find that he was, and the Court erred in deciding that the appellant was responsible for all the payments made to him without leaving that question to the jury.

9th. Even if McGinn had been originally the agent of the appellant, or of both parties, his agency terminated with the making of the loan, and he was not entitled, as against the appellant, to receive margins or payment in advance. *Story on Agency, sec.* 109.

Wm. F. Frick for the appellees contended.

I. That Small was the agent of the plaintiffs, not merely to make the loan, but to do all that he did in the transaction. And that the plaintiffs are not at liberty to repudiate any of his acts. It was on their behalf that he made the contract, in manner and form as he did; on their behalf that he superadded to the contract, the condition about "margins;" and on their part, and for their benefit, that he called for the margin, received one, and paid it over to the plaintiffs. Whether originally authorized to go to this extent, matters not. Their subsequent conduct ratified his acts. *Story on Agency, secs.* 253, 259. *Also secs.* 244, 249. And their receipts of the margin precludes them from objecting to his proceedings. In ratifying them in part they adopt the whole. *Story on Agency, sec.* 250.

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II. The allowance by the bank of the manner and terms in which Small contracted with McGinn, and called for margins through him, and the acceptance by the bank of the margins received under that contract and call, justified the act of Small in making McGinn the sub-agent in the bank; and McGinn became, *quoad* the calls for and receipts of margins from Stein, the agent of the bank. *Story on Agency, sec.* 249.

III. But whether these points be well taken or not it is clear that this is a case where the contract was in writing, and on its face McGinn was the principal. It is true that he was known to be only an agent, but his principal was not disclosed or asked for by the other party. McGinn was therefore personally responsible upon the written contract, and cannot be discharged as such by parol evidence. It is true that the principal when disclosed was also bound; but with this important qualification, that if he in the intermediate time had settled with his agent, he could not be held bound. *Story on Agency, sec.* 449, *and note. And Paley on Agency, (by Lloyd,)* 246–254.

The different cases in which the agent alone, or the principal alone, or both are bound, are well put in this note. The point, however, is settled by the case of *Thompson vs. Davenport*, 9 *Barn. & Cress.*, 78 *et seq.* Lord TENDERDON says, the case of a party dealing with an agent, knowing him to be such, but not inquiring who is the principal, is like that of a party dealing with an agent, and supposing him to be a principal. That is to say, in both cases, the principal when disclosed may be charged, "subject, however, to this qualification, that the state of the account between the principal and agent is not altered to the disadvantage of the principal." Justice BAYLEY puts it in this language: "If the principal has paid the agent, or if the state of the accounts between the agent and principal would make it unjust that the

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seller should call on the principal," it is an answer to the action, &c.

WEISEL, J., delivered the opinion of this Court.

The appeal in this case is from a judgment of the Court of Common Pleas for Baltimore City, and the questions raised by the record and briefs are:

First. Whether the action can be maintained between the parties;

Secondly. If so, whether the defendants were entitled to a certain credit for five hundred dollars claimed by them under their plea of payment, which was resisted by the plaintiff.

The facts set out in the exception, as proved in the cause, and which were to be found by the jury, show that the contract sued on was made by the agents of the respective parties; the plaintiff being made known to the defendants at the time of the contract, but the defendants not being disclosed until some time afterwards, but before the day of payment arrived; it being known however to the plaintiff at the time of the contract that McGinn, a broker, was acting as an agent in the premises for one of his customers. As to the liability of the defendants to the plaintiff in such a case this Court entertains no doubt or difficulty. The law is well settled that the principal is personally responsible in all cases of contracts made by an agent, within the scope of his authority, and this is not varied by the fact that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit was given to the agent. The circumstance that the name of the principal was not disclosed at the time of the contract, does not determine the election of the plaintiff to look to the agent alone for the fulfillment of the contract. The principal is,

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notwithstanding, answerable when discovered. *Story on Agency, sec.* 446 *and notes. Thomson vs. Davenport,* 9 *Barn. & Cres.*, 73. And such is the law with regard to a plaintiff, principal, who contracts by an agent. If the agent contracts in his own name without disclosing the principal, either the agent or the principal may sue upon the contract; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the principal as if the agent had been the contracting party. *Sims vs. Bond,* 5 *Barn. & Adol.*, 389. *New Jersey Steam Nav. Co., vs. Merchants' Bank of Boston,* 6 *How.* 380, 381. In all cases of contracts by agents, without disclosing their principals, the Courts in affording remedies, will look to the substantial parties in interest, in order to avoid circuity of actions, saving however to the defendant any rights which he may justly acquire as against the plaintiff by the course of dealing anterior to the disclosure, either with the agent of the plaintiff, or his own agent.

The liability of the defendants in this case, under the law as herein stated, was not disputed by their counsel in the argument, but it was insisted, and that is the main point of inquiry, that their responsibility must be taken with this qualification, that if in the meantime, before their names were disclosed, they had settled with their agent they could not be held bound, and that the payment by them of both the margins called for the plaintiff to their agent before their names were made known, enured to their benefit and should be credited on the plaintiff's claim in suit, whether paid over by their agent to the plaintiff or his agent, or not. That the rule of the defendant's liability is subject to a qualification, arising from his transactions in relation to the contract with his agent in the interval, which will discharge it under certain circumstances, is true. This qualification is stated by Judge

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STORY (*Agency, Sec.* 449,) thus: "That the principal will not be made personally liable, if, in the intermediate time, he has settled with his agent, without any suspicion of his own personal liability, or if he would otherwise, without any default on his own part, be prejudiced by being made personally liable." Examples are given and the authorities cited both in the text, and in the notes, to illustrate and explain the extent and bearing of this qualification, and the section concludes with the author's view of it, as derived from the later decisions. In all the cases he declares it essential that the plaintiff should in some way have either deceived the principal, or induced him to alter his position and account towards his agent, before he is deprived of his remedy against the principal; and that it is now settled that the simple fact that the principal has paid his agent the funds with which to pay the plaintiff, does not deprive the plaintiff of his right to look to the principal, if the agent fail to pay over according to his orders. Same sec. and PARKE BARON *in Heald vs. Kenworthy*, 10 *Ex.*, 739, and other cases cited in note 1.

The instruction of the Court below to the jury on the trial of this cause, was, that if they believed the facts stated in the bill of exceptions, then the defendants were entitled, as against the plaintiff, to be credited with all the money paid by them to McGinn, whether paid over by him to Small or the plaintiff, or not. This was given upon one of two grounds, either that McGinn, in the matter of the margins, acted as the agent of the plaintiff, and that his receipt of them was the receipt of the plaintiff; or, that the payment of the margins to McGinn, as the agent of the defendants, exonerated them under the circumstances from their amount in this action.

If the former, then the Court erred, inasmuch as it took from the jury the question of fact as to McGinn's agency for the plaintiff in the receipt of the margins, and assumed

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that there was not only evidence, but sufficient evidence of it, and upon such assumption absolutely instructed the jury to allow the credits. If there was evidence to establish such an agency, the jury were the exclusive judges of its weight. *Henderson vs. Mayhew*, 2 *Gill*, 409.

If, however, the Court acted upon the other ground, and considered, as a conclusion of law, that the payment of the margins by the defendants to their own agent, before the disclosure of their names to the plaintiff, discharged them from further liability for such amount of them as was not paid over to the plaintiff or its agent, we think that in this view the Court also erred in the instruction given. In looking at the evidence in the exception we discover nothing that would tend to show that the plaintiff or his agent, in calling for the margins through McGinn, either deceived the defendants or induced them to alter their position or account towards their agent, or so acted as manifestly to make it unjust in the plaintiff to recover the amount. The contract was made with McGinn as a broker and agent for a then unknown principal, the defendants, who received by way of loan the plaintiff's money, upon a security that was failing to answer the purpose, and which it was agreed should be strengthened by what are termed margins, or additional collaterals. Under the circumstances, McGinn was the proper party to whom the application for the margins should have been made. They were made to him as the only known channel of communication with the real borrower, or as the party personally bound to furnish the required collaterals, and within three days of each other; and the only response to both was the receipt of five hundred dollars which was applied to the plaintiff's claim; but whether this was the money of the agent, or was paid by the defendants, neither the plaintiff nor its agent, Small, then knew. In this we see nothing that could bring the payment of the margins to

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the defendant's agent, within the qualification of the rule of liability as understood and settled by the authorities to which we have adverted. In other words, we do not see in the record any evidence that would exempt the defendants from the payment they claim to have made.

The instruction given to the jury being therefore erroneous upon both grounds, the judgment of the Court below must be reversed.

In passing upon the prayer of the plaintiff and the instruction asked in it, we see nothing objectionable in them as presented. The controversy was narrowed by the pleadings to the one margin that had been received by McGinn and not paid over by him to the plaintiff or its agent. It was not therefore necessary for the Court to instruct the jury that the defendants should be protected in their verdict for the proceeds of the collaterals sold. Looking at the evidence we can discover no proof which would have justified the jury in finding that McGinn acted in the matter of the margins and of their receipt by him from the defendants, as the agent of the plaintiff. In view, therefore, of this state of the case and of what has been said of the law governing it in its other aspects, the instruction asked by the plaintiff was correct, and its prayer, in our opinion, should have been granted.

Judgment reversed and procedendo awarded.

(Decided April 11th, 1866.)

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GEORGE JACKSON AND OTHERS *vs.* JAMES HODGES AND OTHERS.

DEBTOR AND CREDITOR: COMPROMISE WITH CREDITORS PROCURED THROUGH FRAUD.—Where a debtor, having assets sufficient to pay all his debts, makes a false and fraudulent misstatement of his assets to his creditors, and thereby procures a settlement with them, by which they agree to accept his notes for fifty cents in the dollar on their claims, and surrender the original notes and execute a release of all their claims on his paying the compromise notes,—a Court of Equity on proof of the fraud, will set aside the settlement, and apply the property withheld from his creditors to the payment of the balance of their claims.

——: THE STATUTE OF LIMITATIONS will not begin to run in such a case, until the fraud has been discovered or becomes known to the complainants.

APPEAL from the Circuit Court of Baltimore City.

The bill in this case was filed on the 28th of September, 1860, by the appellees against the appellants. After 1st, setting forth the original indebtedness of the defendant, George Jackson, to the complainants, the bill alleges:

2nd. "That the said George Jackson being so indebted to your orators, and also to various other persons and firms in large amounts, amounting in the whole, as your orators are informed and believe, and therefore charge, to the sum of fourteen or fifteen thousand dollars, and having a large amount of property, personal and leasehold, sufficient to enable him to pay his debts, and to have several thousand dollars of surplus, he conceived the idea of defrauding his creditors, and for that purpose increased his indebtedness much larger than it usually was, or the necessities of his business required, and having so increased it, represented himself as being compelled to suspend payment at a time, when he was able to pay his debts and have a considerable surplus, and when he was secretly lending his money to his brother, James Jackson, in large amounts, and having thus, and in other ways secreted a great portion of his

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property and money, represented to his different creditors that he was unable to pay them in full, and that he was unable to pay more than forty *per cent.* of his liabilities, which your orators and his other creditors, as your orators are informed and believe, refused to accept; but after repeated representations as to his inability to do more for them than to pay forty *per cent.* on their claims unless by the aid of friends, he proposed to them to pay fifty *per cent.*, one-half in six months and one-half in twelve months without interest; your orators confiding in the representations, and believing that said George Jackson could not pay more than fifty *per cent.* of his debts, agreed, that is your orators and the said Lewis, Dorst & Co., and all his other creditors, agreed to accept in satisfaction of their claims, fifty *per cent.* thereon, payable without interest in two equal instalments, averaging twelve months after date thereof, upon which the said George Jackson delivered to your orators and said Lewis, Dorst & Co., and all his other creditors, his promissory notes as aforesaid, and they respectively received them in full satisfaction of their respective claims, and delivered to the said George Jackson all the notes of his in their possession to be canceled and executed to him a release of all debts, except the compromise notes so delivered to them by him as aforesaid.

3rd. That having fraudulently procured the release aforesaid, in the manner aforesaid, the said George Jackson soon after secretly and fraudulently deposited with said James Jackson, his brother, at different times, from the perpetration of said fraud until about a year afterwards, upwards of five thousand dollars; and about the same time the said George Jackson purchased several valuable lots of ground, namely: a lot on Lee street from Edward Chamberlain, worth about two thousand dollars; a lot on Howard street

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which was leased by Henry Hursh and wife to said George Jackson and James Jackson, and which, with the money of the said George Jackson, they improved at an expense of about five thousand five hundred dollars; besides the property aforesaid, the said George Jackson owned at the time of the perpetration of the fraud aforesaid, a lot on Buren street worth about one thousand dollars, and a lot on Aisquith street worth about twelve hundred dollars.

4th. That sometime in the year eighteen hundred and fifty-seven, the said James Jackson conveyed to said George Jackson his interest in the said lot of ground on Howard street; that in the month of January, 1858, the said James Jackson became embarrassed, as your orators are informed and believe, and being indebted to said George Jackson in a large amount of money, namely: between five and six thousand dollars, sold to said George Jackson his entire stock of merchandise, worth about six or seven thousand dollars, in payment to the extent of said indebtedness from said James Jackson to George Jackson. The creditors of said James Jackson, knowing the insolvency of said George Jackson as aforesaid, and not doubting the reality thereof, and having no knowledge of said fraud, having received information of the said last mentioned conveyance and sale, concluded that said George Jackson could not have it in his power to make said purchases, and were of opinion that the said sale and conveyance were made to defraud the creditors of said James Jackson, threatened the said George Jackson that they would file a bill in Chancery against him, and have said last mentioned conveyance and sale set aside, and the proceeds of the property so sold and conveyed by James Jackson to him, applied to the payments of the debts of said James Jackson, upon which, fearing an investigation thereof, and as your orators believe, and therefore charge

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that the creditors of George Jackson would discover the fraud which had been perpetrated on them, in order to defeat their claims, and those of the creditors of James Jackson, by deed bearing date the 6th day of November, in the year 1858, and recorded among the Land Records of Baltimore City, in *Liber* "G. E. S.," No. 159, folio 188, &c., the said George Jackson assigned the said lot on Howard street to James Atchison for the pretended consideration of five thousand five hundred dollars, though as your orators are informed and believe, no consideration was given for said deed, but the same was made in secret trust for George Jackson, and by deed bearing date the 12th day of November, in the year 1858, and recorded among the Land Records of Baltimore City, in *Liber* "G. E. S.," No. 159, folio 415, &c., the said George Jackson, for the pretended consideration of twenty-five hundred dollars, assigned the said lot of ground on Lee street to George Russell, though no part of the consideration mentioned in said deed was paid, but the same was made to said Russell in secret trust for said George Jackson.

5th. That by deed bearing date the 28th day of December, in the year 1858, and recorded among the Land Records of Baltimore City, in *Liber* "G. E. S.," No. 162, folio 151, &c., made by said George Jackson to said George Russell, the said George Jackson assigned to said George Russell the said lot of ground on Aisquith street, and the said lot of ground on Buren street, as is pretended for the consideration of two thousand dollars, though no part thereof was paid, but the same was made in secret trust for said George Jackson.

6th. That by deed bearing date the 6th day of November, in the year 1858, and recorded among the Land Records of Baltimore City, in *Liber* "G. E. S.," No. 169, folio 506, &c., the said James Atchison, at the instance

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and request of said George Jackson, assigned to Elizabeth Jackson, the wife of said George Jackson, the said lot of ground on Howard street, for the pretended consideration of five thousand five hundred dollars, though no part of said consideration was in fact paid.

7th. That by deed dated the 12th day of November, 1858, and recorded among the Land Records of Baltimore City, in *Liber* "G. E. S.," No. 170, folio 141, &c., the said George Russell, at the instance and request of said George Jackson, assigned to said Elizabeth Jackson, the said lot of ground on Lee street for the pretended consideration of two thousand five hundred dollars, though no part of said consideration was in fact paid.

8th. That by deed dated the 8th day of December, 1858, and recorded among the Land Records of Baltimore City, in *Liber* "G. E. S.," No. 172, folio 510, &c., the said George Russell, at the request and instance of said George Jackson, assigned to said Elizabeth Jackson the said lot of ground on Lee street, and the said lot of ground on Buren street, for the consideration, as is pretended in said deed, of two thousand dollars, though no part thereof was paid.

9th. That since the fraudulent compromise aforesaid, effected by said George Jackson with his creditors, the said Lewis, Dorst & Co., for a valuable consideration, assigned their said claim to said Hodges Brothers. That your orators had no knowledge that they had been so defrauded until within three months before the filing of this bill, and they are informed and believe, and therefore charge, that none of the creditors of said George Jackson had any knowledge until within the three months last past before the filing of said bill, that they had been defrauded by the said George Jackson.

10th. That the said James Jackson being indebted to

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said George Jackson for a portion of said money, on or about the 16th of July, 1859, as your orators are informed and believe, passed to said George Jackson two promissory notes, made by a certain John Foley and endorsed by said James Jackson. That said George Jackson passed to a certain Silas M. Hamilton, said promissory notes, made by a certain John Foley and said James Jackson, and obtained a judgment against said John Foley and against said James Jackson, for the money mentioned in said promissory notes, namely: about four hundred and twenty dollars, and that the consideration for said promissory notes was part of the money secretly and fraudulently deposited by said George Jackson in the hands of said James Jackson as aforesaid, or a part of the proceeds thereof.

11th. That the said George Jackson, as your orators are informed and believe, paid said Silas M. Hamilton the said judgments, and has had the same entered to his use, and has caused to be issued thereon writs of "*fi. fa,*" directed to George H. Dutton, Sheriff of Baltimore City.

12th. Your orators further charge that by the making of said deeds to James Atchison and George Russell, he, the said George Jackson, rendered himself hopelessly insolvent, and unable to pay the debts he owes your orators and his other creditors, and also that the said Elizabeth Jackson had no money or property at the time of her intermarriage with said George Jackson, and that she has no money, property or effects, except that which was conveyed to her by the deeds aforesaid.

13th. That should said George Jackson obtain possession of said money mentioned in said judgments, and that owing to him by said James Jackson and said John Foley, he would, as your orators believe, fraudulently secrete it, and if in his power, place it beyond the reach of your orators and his other creditors.

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14th. Your orators therefore charge, that the said property so conveyed to Elizabeth Jackson was obtained by her, through the instrumentality of said George Jackson, and without any money or other valuable consideration having been paid by her therefor, but that the same is held in secret trust by her for said George Jackson, and that a portion thereof was owned by said George Jackson at the time he fraudulently persuaded his creditors to release him as aforesaid, and that the balance thereof was purchased with money, or the proceeds of the sale of property then owned by said George Jackson; and that the same or no part thereof, was acquired by him through any acquisitions he may have made subsequent to the perpetration of said fraud; and that the same was purchased from the proceeds of the sales of goods, sold by your orators and other creditors of said George Jackson, to said George Jackson, out of a part of which they have been as aforesaid, for the present, defrauded, and they now urge that in equity and justice, that said property and credits of said George Jackson, if not considered as theirs, should, so far as their said debts are concerned, be subject to the payment thereof, and also to the payment of all other creditors of said George Jackson fraudulently delayed as aforesaid.

15th. Your orators therefore charge, that the said promissory notes of George Jackson, delivered by your orators to George Jackson on the making of said compromise with him, were procured by him through fraud, and that the said deeds made by said George Jackson to James Atchison and to George Russell, and the deeds aforesaid, made by James Atchison and George Russell to said Elizabeth Jackson, were fraudulent and made with the view and intent to hinder, delay and defraud the creditors of said Geo. Jackson, of their lawful accounts and claims; and, also,

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that the money deposited in the hands of James Jackson was so deposited with the view, purpose and intent to hinder, delay and defraud the creditors of said George Jackson of their lawful accounts and claims, of which money so deposited in the hands of James Jackson, or the proceeds thereof, there is in the hands of John Foley and James Jackson, about three thousand dollars.

The bill concludes with a prayer, that the said George Jackson, Elizabeth Jackson, his wife, James Jackson, John Foley, James Atchison, George Russell and George H. Dutton, may answer the matters and things hereinbefore stated and charged, as fully and particularly as if they were herein again repeated, and they were thereto especially interrogated; and that said George Jackson may state what property, real, personal and mixed, and money and effects of which he was seized or possessed, immediately after the execution of said deeds to said James Atchison and George Russell, and of what the same consisted, and where located, and if out of his possession, in whose possession it was immediately after the execution of said deeds, and that he will state the value of each particular parcel of the property of which he was so seized or possessed at the time last aforesaid, and the value of the entirety thereof, and the amount of the money of which he was possessed, and the amount if any of the debts due to him, and by whom owing, and the amount owing by each of said debtors, and the residence of each of said debtors, and how, and in what manner such debts were contracted; and that the said James Jackson and John Foley may be restrained from paying to said George Jackson the money mentioned in said judgments, or any money they owe him, and that they or either of them may be ordered to pay the same into Court, and all other money which they or either of them may owe him, the said George Jackson; and that the said George H. Dutton, Sheriff of Baltimore City, may

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be ordered and restrained from collecting the money mentioned in said writs of "*fi. fa.*," from said John Foley or James Jackson; and the said George Jackson and Elizabeth Jackson, his wife, may be restrained from collecting the rents, selling, disposing of or conveying any of the property conveyed to said Elizabeth Jackson, by the deeds aforesaid, made to her by said George Russell and James Atchison, and from collecting the rent thereof, and that an account may be taken of the rents of said property since the date of said deeds, and that Elizabeth may be decreed to pay the same to your orators and the other creditors of George Jackson, as this Hon. Court may direct from said John Foley or James Jackson; and that a decree may be passed setting aside as fraudulent and void the said deeds made by said George Jackson to said James Atchison, and the said deeds made by said George Jackson to said George Russell, and the said deeds made by said George Russell to said Elizabeth Jackson, and the said deed made by said James Atchison to said Elizabeth Jackson; and that the property mentioned in or described in said deeds from George Russell to said Elizabeth Jackson, and that described in the said deed from said James Atchison to said Elizabeth Jackson, be sold, and in the meantime that a receiver may be appointed to collect the rents of said property, and the said debts owing by James Jackson and Foley, and the proceeds thereof, together with the money mentioned in said judgments, and that which may be owing by James Jackson and John Foley, to said George Jackson, be applied, so far as may be necessary, to the payment of said claims of your orators, and to the claims of all the other creditors of George Jackson, defrauded by him as aforesaid; and that said releases may be declared void, and that your orators may have such other and further relief as their case may require.

The defendants, George Jackson and Elizabeth Jackson, filed an answer to the bill, and a decree *pro confesso* was

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taken against the other defendants. Under the commission for testimony a number of witnesses were examined and a mass of documentary evidence was filed."

James Atchison, examined by the complainants, and being shown complainants' Exhibit A, filed under the commission, stated as follows:

The property therein described was conveyed to me by George Jackson; I gave Jackson my notes for the consideration money therein mentioned, viz: $5,500; I gave him eleven notes of $500 each; I paid no money on account of the said notes; I renewed said notes some five or six months ago; Jackson has never demanded payment of the notes from me; I do not know who prepared the deed; I did not pay for preparing the deed—I presume Jackson did; Jackson paid for acknowledging the deed—he also paid for the recording of the deed; I never got possession of said property,—never got any part of it,—never paid any ground rent on it or taxes; I am not related to Jackson.

"Complainants' Exhibit B," filed under the commission-in-chief in this cause, was here shown to witness, who further testified as follows:

On the same day that Jackson conveyed the property above referred to, to me, I conveyed it to Elizabeth Jackson, his wife, without any consideration; Mrs. Jackson is not related to me; I was acquainted with Mrs. Jackson from one to two years previous to making the conveyance to her; she was not present when I executed the conveyance to her; she did not give or promise me anything for the conveyance; nor did her husband give or promise me anything for making the said conveyance, and I did not ask him for anything.

George Russell, a witness for complainants, testified as follows:

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I know the house of Hodges & Brother, and I know all the parties defendants; George Jackson made a deed of some property to me in 1858,—I think there were two houses conveyed to me—one of them in Lee street and the other somewhere in Old Town; I paid very little attention to them; I did not, to my knowledge, see the house in Old Town before it was conveyed to me; I cannot say that I saw the house in Lee street before it was conveyed to me, but I may have seen it afterwards, as Jackson is now living in a house on Lee street where I have been, and presume it to be the house that was conveyed to me; Jackson came to me and proposed selling the houses as he had got into some difficulty with his brother; I did not want to buy the houses; I did, however, take an assignment of them.

"Complainants' Exhibits C and D," filed under the commission-in-chief in this cause, was here shown to witness, who proceeded:

I gave Jackson my notes for the consideration mentioned in said Exhibit C; I gave him five notes for $500 each, payable at 4, 8, 12, 16 and 20 months; I did not pay said notes; I did not pay a cent on account of them; I renewed said notes about six months ago; I don't know who prepared the deed; I don't know who paid for drawing the deed; nor do I know who paid for the recording of the deed; I did not pay for any; I never got possession of the property, or received any rents from it, or pay any ground rent or taxes; on the same day I conveyed said property to the wife of George Jackson, for which I received no consideration, and I was not promised any consideration; I think Mrs. Jackson was not present at the making of the conveyance to her; I had known Mrs. Jackson from one to two years; neither Mr. or Mrs. Jackson are related to me.

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"Complainants' Exhibits E and F," filed under the commission-in-chief in this cause, were here shown to witness, who continued as follows:

The first conveyance from Jackson to me was for one lot, and in a subsequent conveyance there were two lots conveyed to me by him; I don't know where the two lots named in the subsequent conveyance are situated; I never went to examine them before I took the conveyance for them; I gave him four notes for the consideration money for $500,—each payable in 4, 8, 12 and 16 months; I did not pay said notes, or anything on account of them; they were renewed at the same time with the others; I don't know who prepared the deed,—I did not pay the cost of preparing it, or acknowledging or recording it; I never got possession of this property, and never asked for it; I can't tell where the lots are located; I think one is in Buren street; I don't know where the other is; I conveyed said property on the same day to George Jackson's wife without consideration; I received none, asked for none, and none was promised me; I understood from my conversation with George Jackson that I would be called upon to pay the notes I gave him, and that he was making the property over to his wife to avoid the payment of his brother's debts, and this was the mode he adopted to accomplish it.

James Jackson, a witness for the complainants, then testified as follows: I know all the parties to this suit with the exception of Sheriff Dutton, and I am not able to say whether I know him or not. My business in 1855 was coach-making, and I was engaged in that business seven or eight years previous to 1855. My brother, in the year 1855, was engaged in peddling with a horse and wagon, and had been so engaged for five or six years; he failed in business in the year 1855; before he failed I had a conver-

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sation with him in reference to his postponing the payment of his debts. In talking over matters he told me he had made up his mind to fail. In the course of his conversation he said he was going to put off the payment of his notes by renewals, or getting extensions for the purpose of getting in debt as deep as he could; he said he was going to fail, and that he intended not to fail empty-handed—those were about the words he used. This conversation was some four or five months before he failed; he failed in the summer of 1855. I had been in the habit of borrowing money from him before he failed; he was in the habit of loaning money to me about the time he told me he was going to get his paper renewed. When he failed I was indebted to him in about $500 or $1,000; he did not call in the loans he made me at the time he failed; he continued to loan me immediately after he failed; from the time of his failure up to the year 1858, my indebtedness to him increased up to $5,000. "Complainants' Exhibit F F," filed under the commission-in-chief on 17th December, 1860, being shown to witness, he further proved as follows: The property therein described is the property that he and his brother, George Jackson, leased from Henry Hursh and wife. Almost immediately after we leased said property we began to improve it, and had the improvements completed in about six months thereafter at a cost of about $5,500; George advanced the greater part of the money for the improvements. "Complainants' Exhibit G," filed under the commission-in-chief on 17th December, 1860, now shown to witness, is the assignment of said property from witness to his brother George. At the time of the said assignment we adjusted our accounts, and I was found indebted to George, after having made the assignment, in the sum of $2,378 or $2,379 and some cents. George went into my employ about the 1st January, 1857, at a salary

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of $500; he was my general superintendent; he remained in my employ from January, 1857, until the fall of 1858, during which time he was absent about three months. I know a lot of ground on Lee street which my brother George told me he paid $2,000 for. I have seen the house on Aisquith street; he leased the said lot from Jas. Mullin, and George himself improved it; he told me it cost $1,400 to improve it. I have seen the property he owned on Buren street; he said it cost him from $1,000 to $1,100. Some time after George's failure, he stated in a conversation that he had with me, that if he was successful in winding up his business he expected to be worth from $16,000 to $18,000. I remember that in a conversation with George, soon after his failure, George told me that he could have paid all his debts and have something left. I remember when George was compromising with his creditors—I endorsed his compromise notes. I do not know the amount I endorsed; I did not, about that time, refuse to endorse any notes that he wanted me to endorse. I never refused to endorse any of the compromise notes on the ground that I wanted the old notes held by the creditors first to be returned; I endorsed all the compromise notes when and as he wanted me to endorse them. About the time of the compromise George never asked me to advance any money for the payment of any of his creditors; I had no communication with any of George's creditors in reference to the compromise; I did not tell George that I would pay his creditors fifty cents on the dollar, deducting one per cent. a month for twelve months. From the time I had the settlement with George in February, 1857, when we adjusted our accounts, he increased my indebtedness to him by loans and merchandise, so that in the summer of 1858 I was indebted to him in the sum of $5,000.

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The cause having been heard, the Court (KREBS, J.) on the 28th of November, 1861, passed a decree by which the deed dated the 6th of November, 1858, from Geo. Jackson to James Atchison; the deed dated the 6th of November, 1858, made by James Atchison to Elizabeth Jackson; the deed dated the 12th day of November, in the year 1858, made by George Jackson to George Russell; the deed dated the 12th day of November, in the year 1858, made by Geo. Russell to Elizabeth Jackson; the deed dated the 28th day of December, 1858, made by George Jackson to George Russell, and the deed dated the 28th day of December, in the year 1858, made by George Russell to Elizabeth Jackson, were vacated, annulled, and declared to be utterly void and of no effect as against the complainants, and all others the creditors of said George Jackson, for debts contracted before the 28th day of December, in the year 1858.

And it was further adjudged, ordered and decreed, that so much of the property intended to be conveyed by said six deeds, as may be necessary to satisfy the complainants and all others, the creditors of said George Jackson, for debts contracted before the 28th day of December, 1858, with the interest that may have accrued thereon, and the costs of this cause, be sold, unless the said George Jackson or Elizabeth Jackson shall, on or before the 1st day of May, 1862, pay and satisfy, or bring into this Court to be paid to said creditors the amount of their claims and of the costs in this cause; provided, however, that no part of said property be sold until such sale can be made consistently with the provisions of the Act of Assembly of 1861, ch. 17, and any other Act staying such sales; that John McLaughlin be and he is hereby appointed trustee to make said sale; that the course and manner of his proceedings shall be as follows, &c., &c.

And the decree then proceeds as follows:

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It is further adjudged, ordered and decreed, that the proceedings in this cause be referred to the auditor to state an account between George Jackson and James Jackson and John Foley, and to ascertain the amount due from said James Jackson and John Foley and each of them, to George Jackson, arising from money loaned by said George Jackson to said James Jackson, before the 28th of December, 1858, and for rent accrued for, or on account of, any ground conveyed by said deeds.

It is further adjudged, ordered and decreed, that the said James Jackson and John Foley pay to said John McLaughlin, trustee, the money that may be so found due by them and each of them, to said George Jackson.

It is further adjudged, ordered and decreed, that the auditor state an account of the rents collected by said Elizabeth Jackson for or on account of the property mentioned in said deeds since the execution thereof, deducting therefrom ground-rent, taxes and expenses of keeping said property in order.

It is further adjudged, ordered and decreed, the said trustee shall bring into this Court the money arising from said sales, and collections by him to be made by virtue of this decree, to be distributed by the Court after deducting all costs and expenses necessarily incurred in the collection thereof, and such commission to the said trustee as the Court shall think proper to allow in consideration of the skill, attention and fidelity, wherewith he shall have discharged his trust.

And it is further adjudged and decreed, that the defendant, George Jackson, pay the costs of this suit, to be taxed by the clerk; reserving however for further consideration and decree or order, all equities and priorities, as to the distribution of the money so to be brought into Court, and also the disposition of the certificate of Baltimore City six per cent. stock, in reference to all of which the parties

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hereto are permitted to take testimony before the auditor, and also in reference to the accounts to be stated as aforesaid.

From this decree the present appeal is taken.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, and WEISEL, J.

Bernard Carter for the appellants.

The bill of complainant is a long one; but an examination of it will show that, in order to sustain it, the appellees must prove that the settlement made by George Jackson with his creditors in 1855, was procured by fraud on his part. This allegation is the sole foundation of the bill. All other allegations in the bill, and all the evidence in the case, need only be considered as they bear upon this one single inquiry. If the appellees fail to make out affirmatively the above proposition, their bill will have to be dismissed. The bill itself alleges that the complainants released their indebtedness in 1855; if, therefore, there was no fraud on the part of George Jackson, that indebtedness is entirely extinguished; and no matter how prosperous Jackson became afterwards, the bill must be dismissed.

The bill charges that this release and settlement was procured by fraud. Then the appellees must prove it. 12 *Cush.*, 30. *Duvall vs. Coale*, 1 *Md. Ch. Dec.*, 168. *Paige vs. Bent*, 2 *Medcalf*, 371.

In what is the fraud alleged to have consisted? In this: That George Jackson, just prior to his declaration to his creditors, that he could only pay a part of his indebtedness, had purposely increased that indebtedness, and then declared he had not assets sufficient to pay it with, though he

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had in fact enough, and more than enough, and knew he had enough and more than enough. And 2d. That he so concealed and hid away his assets from his creditors, that they could not ascertain their real condition.

Two things must therefore be shown: 1st. Sufficient assets, and knowledge on the part of Jackson of such sufficiency. 2nd. Concealment of the means of such knowledge from the creditors, and false and fraudulent representation of the condition of said assets.

The appellees say, that Jackson is shown to have had money and to have bought property soon after the settlement; and that therefore he must have had assets sufficient to pay his debts when he made the settlement. There is no doubt that he did purchase property subsequent to his settlement, and loaned money to his brother James. But in order that this acquisition of property should benefit the case of the complainants, it must be shown: That this possession of said property after the settlement of August, 1855, was absolutely inconsistent with any representations which he is proved to have made to his creditors.

We respectfully submit that in the absence of all direct proof to show that Jackson had more stock in his store, or more debts due him, or more money in hand than was embraced in his written or oral statements made to his creditors, no Court will infer a fraudulent and false representation of his assets, from the possession by him of the amount of property shown to have been in his possession subsequent to the settlement. *Sto. Eq. Jur.*, §§ 191–197–199. *Sto. Eq. Pl.*, § 271. *Code, Art.* 16, *sec.* 35. *Brown vs. Brinkershoeck*, 6 *Johns.*, 139. *McDowell vs. Goldsmith*, 2 *Md. Ch. Dec.*, 341, *and* 6 *Md. Rep.*, 337. *Murray vs. Costar*, 4 *Cowen*, 627. *Yeaton vs. Lenox*, 8 *Peters' Rep.*, 127.

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P. McLaughlin for the appellees.

The plea of limitations cannot avail the defendants in this cause, because they do not reply to the allegations of fraud secretly perpetrated, and no discovery thereof, though the bill alleges that the frauds were perpetrated secretly, and that the creditors had no knowledge thereof until within three months of the filing of the bill. *Secs.* 2, 3, 4, 9 *of the bill.* 2 *Story's Eq. Jur.*, § 1521, 1521 *a.* *Story's Eq. Pl.*, 754. *South Sea Co. vs. Wymndsel*, 3 *P. Wms.*, 143. As to the frauds, see 7 *Cowen*, 301, 305. *Rollins vs. Moore*, 23 *How.*, 474, 479.

On the question of multifariousness, see 1 Code, Art. 5, secs. 26 and 27; also Art. 16, sec. 16, title "Chancery," sub-title "Amendment." The objection of multifariousness ought to have been taken below, for under the Article and section last referred to we could have amended. There is no multifariousness in this case as to parties. *Story's Eq. Pl.*, § 286. The usual practice of raising the objection as to parties is by *demurrer*, but when raised at the hearing it is not always fatal, and will be allowed at the discretion of the Court. But where the Court can see that the reason of the rule upon which such objections are founded, does not apply, and the objection is not made by demurrer, the Court will not interfere *sua sponte*. *Hamilton vs. Whitridge*, 11 *Md. Rep.*, 129. *Story's Eq. Pl.*, § 271, *note a*, and cases there cited. *Parr vs. The Att'y Gen.*, 8 *Clarke & Fin.*, 434.

BARTOL, J., delivered the opinion of this Court.

In the year 1855, the appellant, George Jackson, being indebted to the appellees and others, in large sums, represented to his creditors that he was unable to pay more than fifty cents in the dollar of his debts, and proposed to them to accept that proposition in full satisfaction of their

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claims; they confiding in his honesty, and relying upon his representations with regard to the value of his assets, accepted his proposition and received from him promissory notes endorsed by his brother, James Jackson, payable on an average of twelve months, without interest, to the amount of fifty per centum of the sums respectively due them, and released and surrendered their claims.

Afterwards, a short time before the filing of the bill of complaint in this case, the appellees being informed that George Jackson, the appellant, had not truly represented his pecuniary condition, but had concealed and secreted a large amount of property for his own benefit, instituted this suit for the purpose of annulling and setting aside the settlement made in 1855, and subjecting the property of George Jackson to the payment of the balance of their claims.

The main allegation of the bill, upon which the appellees' claim for relief depends, is that the settlement of 1855 was procured by fraud on the part of George Jackson. The fraud is alleged to consist in his falsely representing himself as unable to pay more than fifty per centum of his debts, when in fact he had property enough to pay them in full; and in his concealing from his creditors the real amount and value of his property, and thereby inducing them to accept the composition proposed.

As fraud is never presumed, but must be established by proof, it is our duty to examine the evidence contained in the record, and to determine whether in our opinion, it is sufficient to prove the fraud and deception charged in the bill of complaint.

It appears from the evidence, that in order to induce his creditors to accept the terms offered, George Jackson exhibited to them a statement of the amount of his debts, and the estimated amount or value of his property, consist-

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ing of his stock of goods on hand, and the debts due him considered as good. These statements are not produced, nor is there any very distinct evidence of the several amounts or estimates contained in the statement.

It plainly appears from the testimony of *Allen T. Lewis*, one of the creditors, who was examined as a witness both for the complainants and the defendants, that the statement exhibited by George Jackson did not contain an invoice of his stock of goods, or specify in detail either the items of his property or a list of the sperate debts due him, but merely the aggregate amount of his liabilities, and two items showing the aggregate amount of his property and sperate debts.

There is no dispute about the amount of his liabilities; by an agreement signed by the solicitors, they are admitted to have been in the aggregate $18,546 16.

The witness, *Allen T. Lewis*, states that he made the calculation from the statement shown, and the result was that after paying fifty per cent. there would be left to George Jackson a surplus or margin of $1,800 or $2,000, which he thought was "no more than he was entitled to have for selling the goods, making the collections, and for the risk he would run, and including also a little margin to enable him to go on and continue business." He also states that George Jackson represented that the statement "embraced all his property except his household furniture, which he (witness) thought the creditors ought not to require of him."

This evidence is conclusive to show that the whole amount of his property as represented to his creditors, was from $11,000 to $11,273. This is ascertained by adding $1,800 to $2,000 to the sum of $9,273, the sum proposed to be paid to the creditors.

What was the whole value or amount of his assets at

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that time is not proved by direct evidence. But he concedes in his answer that the estimate he then put upon his stock of goods was $13,000, (and that they were actually sold for more.) James Jackson, his brother, owed him $500 to $1,000. What other debts were due him is not shown. He owned two improved lots, one on Buren street, and one on Aisquith street, both of which, however, were encumbered with mortgages, and their value, if any, beyond the amount of the incumbrances, does not clearly appear. But estimating only the stock of goods on hand, and the debt then due him from James Jackson, it is clear that these items together exceed by the sum of $2,500 or $3,000, the whole amount represented by him on his statement, shown to the creditors to be the whole value of his property. In addition to this, the proof shows that within six months after he effected the composition with his creditors, he purchased a lot on Lee street for $2,000, and in little more than a year had advanced in cash for the improvement of the property on Howard street (leased by him and his brother James,) the additional sum of $5,500. And as no other explanation is afforded by the evidence, we are compelled to the conclusion that his property and effects at the time of the settlement greatly exceeded the amount represented by him to his creditors, and were sufficient to pay his debts in full. This is the irresistible conclusion from the evidence in the cause, independently of the positive testimony of James Jackson, of which we shall speak presently.

There are some other facts conclusively established by the proof, that are inconsistent with honesty, truth and fair dealing on the part of George Jackson, in procuring the settlement with his creditors.

He represented that his disasters in business had been occasioned by the protracted illness of his wife, and the consequent large expenses incurred by him. The proof

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shows that her illness was of short duration; and though he had the misfortune to lose her in the spring of 1855, the evidence of Dr. Flemming, the family physician, shows that his medical bill did not exceed twenty dollars, and there is no evidence of any large losses or expenses incurred by him.

His correspondence with his creditors in New York and Philadelphia, Messrs. Johns & Payne, Sharpless Brothers, Amer & Co., and Hammil, Wevil & Co., exhibited in the record, both in its tone and substance, shows a reckless disregard of truth and fair dealing on his part.

While dictating to them his own terms in a most arbitrary way, he represents to them that his brother James, whom he offers as endorser on his notes, insists upon having the old notes surrendered before he is willing to become his surety, when in fact, according to James' testimony, he was not even consulted on the subject. He represents that his brother James is willing to discount the new notes at the rate of one per cent. a month, and in some cases the new notes were actually shaved at that rate, not by his brother James, but by himself; showing that he had at that time ready money on hand.

From these facts, combined with the evidence that within a brief period after his composition with his creditors, he was in possession of property of large value, amounting, according to his own statement made to Hayward, the Justice of the Peace, in 1859, to $15,000 or $20,000, as proved by the witness McCauley, in the absence of any satisfactory explanation of the way in which this property was acquired, are convincing proofs that the statement made to his creditors by George Jackson, upon which they relied, and by which they were induced to enter into the composition with him, was grossly untrue and fraudulent.

If there were any doubts, however, on this subject, they would be removed by the positive evidence of James Jack-

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son, who testifies to the fraudulent purposes of George Jackson, and the deception practiced by him upon his creditors in procuring the settlement of 1855.

If the case of the complainants rested exclusively upon the testimony of this witness, unsupported by other proof, we should hesitate in affirming the decree of the Circuit Court. But that testimony is corroborated by other proof, and in those particulars in which it is not positively supported it seems to us to be consistent with the other evidence, and is therefore not to be absolutely rejected.

The result of a most careful examination of the whole case, has convinced us that the fraud charged in the bill has been established by the proof, and therefore that there is no error in the conclusion reached by the Circuit Court upon the facts of the case.

We are of opinion that the exceptions to the bill, on the ground of multifariousness, are not well taken, even if they had been made in time.

We are also of opinion that the defence, under the statute of limitations, is not supported. In such case, according to all the authorities, the statute does not begin to run until the fraud has been discovered, or becomes known to the complainants, which the proof in this case shows was not until a few months before the filing of the bill. A decree will be signed affirming the decree of the Circuit Court, with costs, and remanding the cause for further proceedings.

Decree affirmed and cause remanded.

(Decided April 18th, 1866.)

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The Northern Central Railway Company *vs.* The Canton Company of Baltimore, Lessee.

Amendment of Pleadings: Jurisdiction in Ejectment: Arbitration and Award: Practice in Court of Appeals.—The Declaration in Ejectment described certain lands sued for as "*lying in the city of Baltimore.*" By order of the Superior Court of Baltimore City, where the action was instituted, the cause was referred to an arbitrator, who rendered his award in favor of the plaintiff, for "the lot of ground *in the declaration aforesaid mentioned*, situated and lying *partly in the city of Baltimore and partly in Baltimore County*," &c., &c., "beginning at the intersection of the South side of Sixth Avenue with the west side of Clinton street, as laid down on the plan of the harbor of Baltimore in connection with the Canton Company's lands, compiled by William Dawson, and published in the year 1853, and running thence," &c. On appeal by the defendant, besides the exceptions taken in the Court below, the appellant contended that there was a want of identity between the land claimed in the nar, and the land in the award; that there was want of certainty in the award; and that the nar was defective in not stating whether the greater portion of the land sued for lay in the city or in the county, or where the defendant resided, so as to show whether the Court had jurisdiction under the provisions of *sec.* 46, *Article* 75 of the *Code*, Held:

1st. That if in the prosecution of this case *in Court*, the defendant had objected to its jurisdiction that it did not affirmatively appear in the plaintiff's *nar*, that the greater part of the land was within the city of Baltimore, the Court could have allowed an amendment of the pleadings. Failing to avail itself of this defect, it would have been too late after verdict, as every reasonable intendment would be made to support it. And such an intendment will apply with equal or greater force to support an award.

2nd. That there is no want of identity between the land claimed in the nar and that set out in the award.

3rd. That the land is sufficiently described in the award.

Appeal from the Superior Court of Baltimore City.

This is an action of *ejectment* brought in the Superior Court of Baltimore City for certain land described in the declaration as "a certain lot, piece or parcel of ground situate and lying in the city of Baltimore, which is described as follows, to wit: Beginning at the intersection of the south side of Sixth Avenue with the west side of

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Clinton street, and running thence westwardly with the south line of Sixth Avenue about seven hundred and fifty feet to the Port Warden's Line, thence southerly parallel to Clinton street about two hundred feet, thence eastwardly at right angles with said last line and parallel with said Avenue about seven hundred and fifty feet to the west side of Clinton street, thence northerly on the west side of Clinton street, about two hundred feet to the place of beginning with the appurtenances, situate and being in Baltimore city aforesaid." By consent of the parties and under rule of the Court the cause was referred to I. Nevett Steele, Esq., at the same time with the trespass case between the same parties, (Reported *post*, *p.* 500,) and while pending before him the same proceedings by injunction and motion were taken to prevent an award, with those stated in the trespass case, and with a like result. The award in this case made by the referee is as follows:

"I, I. Nevett Steele, appointed referee in this cause by the Superior Court of Baltimore city, having given due notice to the parties of the times and places of hearing their respective allegations and proofs, and having heard and duly considered the same, do award and determine that the said Northern Central Railway Company is guilty of the trespass and ejectment, in manner and form as the said John Doe, lessee of the said Canton Company of Baltimore, in the declaration in this cause has complained; and that the lot of ground in the declaration aforesaid mentioned, situate and lying partly in the city of Baltimore, and partly in Baltimore county, is contained within the metes and bounds, courses and distances following; that is to say, beginning at the intersection of the south side of Sixth Avenue, with the west side of Clinton street, as laid down on 'the plan of the harbor of Baltimore, in connection with the Canton Company's lands,' compiled

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by William Dawson, and published in 1853, and running thence westwardly at right angles with Clinton street, and with and in continuation of the line of the south side of Sixth Avenue, as laid down on said map, to the Port Warden's Line, thence southerly with said Port Warden's line, and parallel to Clinton street two hundred feet, thence eastwardly at right angles with said Port Warden's Line and parallel to the first line of the lot now being described, to the west side of Clinton street, and thence northerly with the west side of Clinton street to the place of beginning; and I do assess the damages of the said John Doe, lessee of the said Canton Company of Baltimore, by reason of the trespass and ejectment aforesaid, to the sum of one cent current money; and I do further award, that judgment be entered up by the said Court for the said John Doe, lessee of the said Canton Company of Baltimore, against the said Northern Central Railway Company, as well for his term aforesaid yet to come and unexpired, of and in the said lot of ground contained within the metes and bounds, courses and distances above set out, as the said sum of one cent for his damages, which he had sustained by reason of the trespass and ejectment aforesaid, together with his costs and charges, by him about his suit in the said Court expended. Witness my hand and seal this 30th day of May, in the year 1863. "I. NEVETT STEELE, (Seal.)
Referee."

The Court, MARTIN, J., overruled the exceptions taken to this award by the defendant, and rendered its judgment as follows:

"Therefore it is considered by the Court here, that the said plaintiff recover against the said defendant his term aforesaid, yet to come and unexpired, of and to the lands and premises aforesaid mentioned and described in the declaration aforesaid, with the appurtenances, as

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well the said sum of one cent, the damages aforesaid, by the arbitrator in form aforesaid awarded, as the sum of six dollars and eighty-eight cents for its costs and charges by it about its suit in this behalf laid out and expended. And the said defendant in mercy," &c.

"*Memorandum:*—July 3rd, 1863, judgment on award for the plaintiff for property and one cent damages and costs."

From this judgment the present appeal is taken by the defendant.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH and WHISEL, J.

J. Mason Campbell and *R. B. T. Campbell*, for the appellant.

The award and judgment rendered thereon are erroneous.

1. Because of the want of identity between the land claimed in the declaration, and the land awarded.

2. Because of uncertainty in the award. The "Plan of the Harbor," is not a matter of record. It was not made by public authority; and there is nothing, therefore, by which a stranger can locate the recovery.

3. Because the judgment is for the land described in the declaration, and not for that mentioned in the award, nor does it in any way refer to the award. *Smith vs. Jenks*, 10 *Serg. & Raw.*, 153.

4. Because if part of the land lies in Baltimore county, the jurisdiction of the Superior Court in respect to that part is special, being conferred by Act of Assembly, to meet the particular case, and not included in its general powers, (Code, vol. 1, Art. 75, sec. 46,) and therefore the facts giving the jurisdiction must appear on the face of the

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pleadings. But such is not the case here. The nar describes the land as lying in Baltimore City, and the judgment is for the property described in the nar; but the award describes the property as lying both in the city and county. Now the judgment is founded on, and must be co-extensive with the award, or else it is a nullity, and yet, if it be so treated, it will cover and apply to property outside of the ordinary jurisdiction of the Court, while the pleadings only present a case of ordinary jurisdiction within the limits of the city.

And apart from the objection that the pleadings do not show that the land lay both in the city and county, it is contended further, that under the section of the Code above referred to, the jurisdiction where land lies in two counties is not given indiscriminately to the Court of either county, but to the one in which the defendant resides, and in such case the pleadings must show affirmatively that the suit is brought in the county or city where the defendant resides, which is not done in this case; so that for this reason there is want of jurisdiction in the Court which must be fatal to the judgment. *Patterson vs. Wilson*, 6 *G. & J.*, 505, 506. *Shivers vs. Wilson*, 5 *H. & J.*, 130.

Geo. W. Brown and *F. W. Brune* for the appellee.

The appellee contends:

1st. That the land claimed in the declaration, and the land awarded, are the same as shown by the metes and bounds and by the award, which sets forth particularly the metes and bounds of "the lot of ground in the declaration aforesaid mentioned," and by the bill in the trespass case filed by the appellant against the appellee in the Circuit Court for Baltimore City, which is referred to in the exceptions filed by the appellee in this case; the only difference is, that the award describes the ground with a little more particularity and accuracy. This it is proper

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that the award should do, and it could correct any error or supply any omission in the declaration. *Ing vs. State*, 8 *Md. Rep.*, 287, *and cases there cited. Cromwell vs. Owings*, 6 *H. & J.*, 12.

2nd. The award is not uncertain, but is certain in every particular. To make it certain, it is not necessary that the plan of the harbor therein referred to should be a matter of record.

3rd. The memorandum of the judgment is "Judgment on award for the plaintiff for property." This is the original entry and the true judgment in the case, and refers exclusively to the property mentioned in the award. But the judgment, when formally extended, (which is the act of the Clerk of the Court,) is, that the plaintiff recover the land and premises aforesaid mentioned and described in the declaration aforesaid. This is equivalent to saying the land and premises aforesaid mentioned in the award and memorandum of judgment, and also described in the declaration. But even if this be not the true construction, and if the extended judgment refers only to the land described in the declaration, inasmuch as the same land is described in both the declaration and the award, the judgment is correctly entered.

4th. In order to sustain an award, the Court will consider any amendment that could be made as having actually been made. If, therefore, it was necessary to allege in the declaration that the lot lay partly in Baltimore city and partly in Baltimore county, the Court will consider that the allegation was made. But the Superior Court is one of general, not special jurisdiction, and therefore the acts establishing its jurisdiction need not be set out. The same considerations apply to the residence of the defendant, which it is not necessary to allege, but only to prove. Besides, the residence of the defendant need not be alleged by the plaintiff; the suit is brought against Richard Roe, who

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gives notice to defendant of the suit. *Ing vs. State*, 8 *Md. Rep.*, 287.

5th. The Court of Appeals, on reversing any judgment or part of a judgment at law, has power to give such judgment as ought to have been given by the Court below. Code, 22, Art. 5, sec. 14. If, therefore, there was any error in entering this judgment on the award, it is the right and duty of the Court to correct it. This Court, before the adoption of the Code, would have had a similar error corrected in the Court below by ordering a writ of diminution. *Duvall vs. Wells*, 4 *H. & McH.*, 164. *Fisher vs. State*, 1 *H. & J.*, 416.

GOLDSBOROUGH, J., delivered the opinion of this Court.

The action of ejectment in this case was instituted by the appellee against the appellant, in the Superior Court of Baltimore City, to recover a parcel of land lying partly in Baltimore city and partly in Baltimore county, but alleged in the *nar* to lie in Baltimore city. This suit was pending at the same time, in the same Court, with an action of *trespass q c. f.*, between the same parties. Both suits were referred, under the provisions of the 7th Article of the Code, to I. N. Steele, Esq., as referee.

While the subject of this and the other suit was under the consideration of the referee, and before any award was made, the appellant obtained an injunction out of the Circuit Court for Baltimore City to restrain his proceedings. He, however, proceeded to make and return his award, and judgment being rendered thereon, this appeal was taken. The Canton Company appealed from the order of the Circuit Court granting the injunction, and entered into an appeal bond to prosecute the appeal. This appeal was pending in the Court of Appeals when the referee returned his award and when judgment was rendered thereon.

We have considered the effect of the appeal and the

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appeal bond in the action of trespass between the same parties, *post*, 500. The conclusion we arrived at in that case is equally applicable to this. Besides the exceptions in the record, the appellant contends that there is a want of identity between the land claimed in the *nar*, and the land in the award, and also the want of certainty in the award; and that the declaration is defective in not sufficiently defining the land, to show affirmatively that the greater part of it was within the city of Baltimore, thus securing to the Superior Court jurisdiction under the provisions of the 46th section of the 75th Article of the Code.

The jurisdiction conferred by the above article and section is general, extending to all the Common Law Courts of the State, and has for its object the prevention of a multiplicity of suits. If in the prosecution of this case in Court the defendant had objected to its jurisdiction, because it did not affirmatively appear in the plaintiffs' nar, that the greater part of the land was within the city of Baltimore, the Court could have allowed an amendment of the pleading. Failing to avail itself of this defect, it would have been too late after verdict, as every reasonable intendment would be made to support it, and such an intendment will apply with equal or greater force to support an award. *See* 2 *G. & J.*, 68. 10 *G. & J.*, 193.

We cannot sustain the objection made by the appellant that there is a want of identity between the land claimed in the *nar* and that set out in the award, and that the award does not sufficiently describe the land.

Comparing the description in the *nar* with that in the award, we find them identical except the statement of the referee that the land lies partly in the city and partly in the county. In both the *nar* and award the description embraces "calls" so notorious, that no difficulty could possibly arise in locating the claim and pretensions of the plaintiffs.

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For these reasons and those assigned in the *trespass* case we shall affirm the judgment.

Judgment affirmed.

(Decided April 25th, 1866.)

The Northern Central Railway Company *vs.* The Canton Company of Baltimore.

Arbitration and Award.—When an award is made on a case referred, under the 7th Article of the Code, no objections can be be ordinarily made to it, except such as are specified in the 2nd section of the above article, or to such legal objections as appear on the face of the award.

——: Code, Art. 5, Sec. 23: Effect of Appeal from Order Granting an Injunction.—A case was referred to an arbitrator by consent, under rule of the Court in which the suit was pending. While the matter was still before the arbitrator the defendant obtained an injunction, restraining the plaintiff from proceeding with the reference. The latter filed an answer and took an appeal from the order granting the injunction, and gave bond as required by law. The arbitrator having filed his award during the pendency of the appeal, on exceptions to it for that cause, Held:

1st. That by the true construction of sec. 23, Art. 5 of the Code, upon appeal taken, and the giving an appeal bond, the operation and effect of the injunction entirely ceases until judgment shall be pronounced by the appellate tribunal.

2nd. That the arbitrator was not prevented by the pendency of the injunction case from going on with his award.

Appeal from the Superior Court of Baltimore City.

The appellee instituted an action of *trespass q. c. f.* against the appellant in the Superior Court of Baltimore, and by consent of the parties the case was referred under rule of the said Court to I. Nevett Steele, Esq., as referee. While the matter was pending before

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the arbitrator, the defendant instituted proceedings in the Circuit Court of Baltimore City, and procured an injunction from that Court, restraining the plaintiff from proceeding with said reference. The plaintiff having filed an answer to the bill, took an appeal from the order granting the injunction, and filed an appeal bond, which was approved.

The arbitrator, treating the appeal as a suspension of the injunction, was proceeding with the arbitration when the defendant filed in the Superior Court the following motion, to wit:

"The defendant moves for a rule on the arbitrator, to whom this case has been referred, to stay further proceedings under said reference until the further order of this Court, upon the ground that an injunction has issued out of the Circuit Court for Baltimore City to restrain the plaintiff from its prosecution, and that the appeal taken by the plaintiff in this cause from the order granting said injunction, is now pending and to be heard at the ensuing June term of the Court of Appeals."

The plaintiff having filed its reasons why this rule should not be granted, the Court (MARTIN, J.) passed the following order:

"In this case the rule to show cause must be discharged. As soon as the cause was referred under a rule of Court, in conformity with the 1st section of the 7th Article of the Code, all jurisdiction over the case was transferred to the arbitrator, as a personal tribunal, selected by the parties themselves, and the Court in which the suit originated lost all control over it, except for the purpose of reinstating it under the 5th section of the 7th Article, or of setting aside the answer, when it was returned, for errors apparent on its face, or for some matter of fraud, imposition or surprise *aliunde* the award. And for this reason the injunction granted by the Circuit Court was addressed

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to the referee and not to this tribunal. An appeal bond having been given by the Canton Company in the equity suit, as authorized by the Code, the case is to be treated as if no injunction had been issued. 11 *Md. Rep.*, 365. And as this Court has no power over the arbitrator in the present position of the case, the rule to show cause is discharged."

The arbitrator thereupon filed his award, which was excepted to by the defendant for the following reasons:

1. "For that while the said cause was pending before the said referee and before the same was brought to a final hearing before him, and before any award had been made or rendered by him, the Circuit Court for Baltimore City, a Court of competent jurisdiction in equity, on a bill of complaint filed therein by said defendant, had passed an order restraining and enjoining the said plaintiff from further proceeding with the said cause, before said arbitrator referee, until the further order of said Circuit Court for Baltimore City, which said order of said Court was duly served on said plaintiff and its attorneys, on 29th day of April, 1863, and of which order the referee on the same day, had due and final notice.

"That said order of injunction has never yet been dissolved, but that notwithstanding said order of injunction, and the protest of the said defendant to said referee made, the said referee did after full notice of said order, and in violation thereof, proceed with and to hear said cause and determine the same, and made the award so as aforesaid, filed in this cause on the 5th day of June, 1863.

2. "For that after the service of said order of injunction on said defendant and its attorneys, and notice thereof to said referee as aforesaid, and before the final hearing of said cause before said referee had taken place, and before said award had been made, the said plaintiff appealed from

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the order of the Circuit Court for Baltimore city, on the 6th day of May, 1863, to the Court of Appeals of Maryland, which said cause stood for hearing at the June Term, 1863, of said Court, and was assigned for hearing on the first day of said term, and was heard and argued by the attorneys of said plaintiff, and of said defendant, at said time, and was thereupon submitted to said Court of Appeals, and before any award had been filed in this cause, or any notice of said award served on the defendant or its attorney; all of which proceedings relating to said appeal were with the full knowledge of the said referee.

"That notwithstanding the pendency of the said cause in the Court of Appeals on said appeal, and which appeal was taken to test, and the decision wherein will test whether the said referee should or could go on with said reference, and render an award in said causes, or whether the matters in litigation in said cause were not exclusively for a Court of Equity jurisdiction; and notwithstanding said cause had been heard in the said Court of Appeals, and was then in the breast of the Court, the said referee did proceed after said appeal taken, and with knowledge that it would be heard, as it *was* heard, to finally hear said cause and to make up his award, and after said argument in the Court of Appeals, did deliver said award to the plaintiff, by whom, on the 5th of June, 1863, a copy of the same was served on the attorney of the defendant."

The Superior Court, (MARTIN, J.,) overruled these exceptions, and ordered judgment to be entered up upon the award. From which order the present appeal is taken.

This cause was argued before BOWIE, C. J., BARTOL, GOLDSBOROUGH, and WEISEL, J.

J. Mason Campbell and *R. B. Taney Campbell*, for the appellant.

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The counsel for the appellant contend that the judgment below should be reversed.

1. Because the referee had no right to proceed with the award, after being served with notice of the injunction.

2. Because the appellee having appealed from the order granting said injunction, the referee had no right to go on with his award while said appeal remained undetermined in the Court of Appeals.

George W. Brown and *F. W. Brune*, for the appellee, argued:

1st. That the decision of this Court in the said injunction case of the *Canton Co. vs. The Northern Central Railway Co.*, is conclusive of this case. That the point was directly raised in said injunction case, that this case had been referred to an arbitrator, and was then pending before him, and it was alleged by this appellant in said injunction case that it was vested with an equitable title in the property in question in this case, and was entitled to the equitable relief of an injunction restraining this appellee from proceeding further in this case before the referee; but the Court of Appeals decided that the appellant had no title, legal or equitable, in or to said property, and was not entitled to the injunction which had been granted by the Circuit Court, and accordingly reversed the decree of said Court, and dissolved said injunction. The grounds on which this Court refused to interfere by injunction with said award and judgment, are equally conclusive against such interference on this appeal.

2nd. Even if the injunction had been violated by the Canton Company, such violation while it would be a contempt of the Court of Equity issuing the injunction, would be no ground for the reversal of the judgment of a Court of Law on such award.

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3rd. That the entire case was submitted to the referee by consent of parties, and rule of Court, and that the referee had entire and exclusive jurisdiction thereof. That the only points now before this Court are those raised in the exceptions filed by appellant, and that neither exception furnishes any legal objection to said award and judgment thereon.

4th. Because the effect of said injunction was stayed by the appeal in this case, and said injunction was dissolved by this Court as having been issued improvidently and improperly. Code, Art. 5, secs. 21 and 23; Art. 1, secs. 1 to 6 inclusive. *Blondheim vs. Moore*, 11 *Md. Rep.*, 365.

GOLDSBOROUGH, J., delivered the opinion of this Court.

The appeal in this case is taken from a decision of the Superior Court of Baltimore City, overruling exceptions to an award of I. N. Steele, Esq., and rendering judgment on the award for the appellee.

The case referred to Mr. Steele originated in an action of trespass *q. c. f.*, by the appellee against the appellant, to recover damage for the trespass alleged in the plaintiff's declaration. While this action was pending in the Superior Court, it was referred to Mr. Steele by consent of both parties, in accordance with the provisions of the 7th Art. of the Code.

The question in dispute being under consideration of the referee, and before any award was made by him, the appellant, at the May Term, 1863, of the Superior Court, made a motion for a rule on the referee to stay the proceedings, on the ground that an injunction had issued out of the Circuit Court for Baltimore City, to restrain the appellee from the further prosecution of the case thus referred, and that an appeal taken from the order granting the injunction was then pending in the Court of Appeals. This order was subsequently reversed.

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The Court discharged the rule, and at the same time the referee filed his award. The reasons filed by the appellant fer setting aside the award and reversing the judgment of the Superior Court, rendered on the award, are set out in the record, and we have maturely considered them.

Where an award is made on a case referred under the 7th Art. of the Code, no objections can be ordinarily made to it except such as are specified in the 2nd sec. of the above article, or to such legal objections as appear on the face of the award. In reviewing the exceptions filed to this award, we find no intimation that the referee acted otherwise than with perfect impartiality between the parties litigant. The only substantial allegation is, that he disregarded the injunction and the pending of the case in the Court of Appeals.

It is important in this connection to bear in mind that the appellee appealed from the order of the Circuit Court, and entered into an appeal bond to prosecute the appeal with effect.

In such case the 23rd sec. of Art. 5 of the Code, provided that "upon giving such bond, the appeal shall stay the operation of such orders," (that is those orders mentioned in the 21st sec.) "in the same manner as do appeals from final decrees."

This provision of the Code is a transcript of the Act of 1853, ch. 374, and this Court has given a judicial interpretation of that Act, which we see no just reason to disturb, and it will control our decision in the present case. In the case of *Blondheim and others vs. Moore*, 11 *Md. Rep.*, 371, 372, this Court construing the Act of 1853, ch. 374, as to the language "shall stay the operation of all such orders in the same manner as do appeals from final decrees," ask, "what is the manner? It is nothing more than this, everything is stayed, suspended, until judgment shall be pronounced by the appellate tri-

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bunal; that is to say, the operation and effect of the injunction wholly and entirely ceased."

For these reasons and those assigned by the learned Judge of the Superior Court, the judgment from which this appeal was taken must be affirmed.

Judgment affirmed.

(Decided April 25th, 1866.)

Henry P. Brooks, Trustee, *vs.* David Hays.

Foreclosure of Mortgage: Code, Vol. 2, Art. 4, Secs. 782, &c.—Where a mortgage of realty in the city of Baltimore contains the assent of the mortgagor to the passage of a decree for foreclosure, as authorized by the Code, Vol. 2, Art. 4, Sec. 782, a decree passed *after default* is within the meaning and purview of the law.

A sworn statement of the amount due, filed by the mortgagee with his petition, after the forfeiture and before the time of sale, is in compliance with sec. 783 of the same article of the Code.

——: ——: Trustees Bond: Practice in Equity.—The bond required by sec. 783 may be given by the trustee at any time before the sale.

——: ——: Trustees Sale: Practice in Equity.—Where a trustee under a decree for foreclosure inadvertently described one of the lots advertised to be sold as subject to a ground rent of $65, instead of $65.50, the true amount,

Held:

That this furnished no adequate ground for interfering with the sale.

Mistake: Trustees Sale: Practice in Equity.—A mistake in the year in one of the advertisements of sale, not calculated to mislead—the advertisement of the same sale in another newspaper being without exception—is an irregularity which the Court may overlook in the ratification of the sale.

Appeal from the Circuit Court of Baltimore City.

On the 27th of May, 1861, the appellant, as trustee, executed to the appellee a mortgage of certain real estate in the city of Baltimore, and in said mortgage was contained the assent of the mortgagor to the passing of a decree for

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the sale of the mortgaged property in accordance with article IV, title "City of Baltimore," secs. 782 to 792 inclusive, of the Maryland Code, volume second.

The mortgage debt became due on the 2nd of May, 1862, and not being paid, the mortgagee on the 18th of June, 1862, filed his *ex parte* petition in the Circuit Court of Baltimore City, accompanying the same with the mortgage, and a statement of his mortgage claim, *sworn to on the 12th of June*, 1862, and asking the passage of decree of foreclosure. On the same day the Court passed a decree for the sale of the mortgaged property, requiring that the trustees appointed to make the sale, *should first file their bond, &c.* That they should then proceed to make the sale, "having given at least three weeks notice by advertisement inserted in such daily newspaper or newspapers, published in the city of Baltimore, as they shall think proper, of the time, place, manner and terms of sale," &c. &c. And in conclusion it was *provided*, "that before the sale hereinbefore decreed shall be made, a statement of the mortgage claim duly verified by affidavit as required by law, be filed in said cause, and any stay created by the stay law and the amendments thereto, shall have ceased to operate."

No statement of the mortgage debt, other than that accompanying the petition for foreclosure, was filed. The trustees bond was not filed until the day of the sale, on which day and before the sale, it was filed and approved.

The sale under this decree was advertised in two of the daily newspapers in Baltimore, in one of which by mistake the day named for the sale was the 9th day of December, 1863, instead of the 9th day of December, 1862; but before the sale this mistake was corrected, the correction being made within three weeks from the day of sale.

The sale as made by the trustees was reported by them

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to the Court, when the appellant filed the following exceptions thereto:

The above named defendant by way of exceptions to the sales made and reported in this case, and as causes against the ratification of said sales, alleges as follows:

1st. That the trustees named in the decree of sale did not file their bond as required by said decree until the day of sale.

2nd. That notice of said sale was published prior to the execution of the bond of said trustees, and no notice whatever of said sale was published after the execution and filing of the trustees' bond.

3rd. That no affidavit of the amount due on said mortgage was made by the said mortgagee at the time of the instituting of the proceedings in this cause, or at any time thereafter, or after the decree of sale and before said sale was made, as required by law.

4th. That the decree of sale required said trustees to give at least three weeks notice of the time, place, terms and manner of said sale by advertisement to be inserted in such daily newspaper or newspapers published in the city of Baltimore, as they, the said trustees, shall think proper; and the said trustees, in pursuance of said decree, caused such advertisement to be inserted in the Baltimore American, and the Baltimore Sun, two of the daily newspapers published in Baltimore; but this exceptant alleges that the said notice, as published in one of said newspapers up to a period short of two weeks before said sale, was variant from the notice as published in the other of said newspapers in this, that the said notice advertised said sale as intended to be made on the 9th day of December, 1863, and the same was only corrected in said advertisement within a period less than two weeks before said sale took place; the effect of which discrepancy in said advertise-

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ment was necessarily to prejudice the sale, and to disregard the terms of said decree as to the notice of said sale.

5th. That the property was misdescribed in the advertisements in this to wit: that the property advertised as beginning at the distance of twenty-two feet from the corner of Ross and Union streets, is advertised as improved by five brick buildings, whereas in fact it was improved by six brick buildings.

6th. That the lot secondly described in said advertisement is advertised as subject to a ground rent of $65, whereas the true rent is $65.50 *per annum*.

7th. That the trustees offered this property for sale in such parcels and lots as prevented it from bringing its fair value.

8th. That there are other errors manifest on an inspection of the proceedings.

9th. That said property was sold at a price grossly inadequate to its market value. And this exceptant prays that said sales and all of them may be set aside.

And afterwards, the said defendant filed the following additional exceptions to wit:

The above named defendant by way of further and additional exceptions to the sale made and reported in this case, and as causes against the ratification of said sales alleges as follows:

1st. That the annuity or sub-rent of $26.25, reported to have been sold, was severed from the ground or lot out of which it issued, and sold thus severed from the lot.

2nd. That there are other important errors, besides those mentioned in the exceptions filed on the 12th January, 1863, in the description of the property in the advertisement of sale, manifest on the inspection of the mortgage filed as an exhibit with the petition in the cause.

3d. That in other respects the property as sold was mis-

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described, and afterwards the defendant filed the following further and additional exception to wit:

The above named defendant by way of further additional exception to the sale made and reported in this case, and as cause against the ratification thereof, alleges as follows: That the petition and mortgage were filed in this cause on the 18th June, 1862, which was subsequent in point of time to the period limited in said mortgage, for the forfeiture of said mortgage, after which period it was not competent for this Court to proceed to decree a sale of the mortgaged premises in this proceeding, or in any mode, except according to the usual course of proceeding in Chancery Courts.

After a hearing, the Court (KREBS, J.,) passed an order overruling all the exceptions but the 5th, which was sustained, and the sale of the lot of ground covered by that exception was set aside. This appeal is taken by the mortgagor from the order overruling the other exceptions.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

R. J. Brent and *J. L. Brent* for the appellant.

By an analysis of Art. 4, secs. 782 to 792, in 2nd Code, it will be seen that by virtue thereof the whole power of the Court is to decree a sale upon application by the mortgagee, "at any one of the periods limited in said conveyance for forfeiture of said mortgage or limited for a default of the mortgagors."

By section 783, the trustee shall, after giving bond and security, and after the arrival of the period limited by the decree, sell; and by same section, the mortgagee or his assignee is to verify on oath, and file in Court, the amount due, and such verification is to be made after the period

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limited as aforesaid, (that is in the decree,) and before the sale.

By section 784, such sales, if ratified, are to have the same effect as if made under decrees between proper parties, and in the usual course, &c.

Article 4, sections 782 and 792, (of the 2nd volume of Code,) is copied from the Act of 1833, ch. 181. The proceeding is nothing more or less than an *ex parte* statutory foreclosure of a mortgage, and being a summary proceeding without notice or summons, it clearly falls under the principle of law which forbids the exercise of jurisdiction by the Court, unless every direction of the law is strictly complied with. *Boarman vs. Israel*, 1 *Gill*, 372. *Savage Man. Co. vs. Owings*, 3 *Gill*, 497. *Emery et al. vs. Owings*, 7 *Gill*, 429. *Winchester vs. The Union Bk. of Md.*, 2 *G. & J.*, 73. *Clarke & Jackson vs. Bryan & Lunt.*, 16 *Md. Rep.*, 177.

The case of an *ex parte* statutory foreclosure, stands on a footing with tax sales, and any irregularity will vitiate. It is decided in 7 *Hill*, 433-4, that statutory foreclosures of mortgages are to be strictly in conformity with the law, or they are void. And to same effect see 7 *Blackford*, 12. 7 *Gray*, 202. 28 *Maine*, 336. 9 *Barb.*, 278. 20 *New York*, 354. The irregular foreclosure operates as an assignment of the mortgagee's interest to the purchaser. See *Walker's Ch. R.*, 494. 2 *Hilliard on Mort.*, 48.

There must therefore be strict proof of the fulfillment of every legal requirement. Our objections to the ratification of this sale are as follows:

1. The decree was obtained after the day limited for the payment of the mortgage debt, and no power is vested in the Court to make such a decree under Art. 4, secs. 782 and 792 of the 2nd Code. This point was expressly ruled by this Court in a case arising under the same words as found in the Act of 1833, ch. 181. *Kenly vs. Bierman*, 18 *Md. Rep.*, 303.

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The Act of 1839, ch. 9, was enacted to supply the "*casus omissus*" in the Act of 1833, ch. 181, but this amendatory Act is not adopted in the Code. See Act of 1839, ch. 9.

2. The affidavit of debt due, must be made after the decree, and strictly it should be on the day limited for the sale, while here it is made before the filing of the petition for sale. *2nd Code, pp.* 308, 783.

That the affidavit must be strictly made as required by the law, see *Gatchell, &c., vs. Presstman et al.*, 5 *Md. Rep.*, 163. 20 *N. York Rep.*, 354.

3. The trustees advertised before they bonded, which is not in compliance with the terms of the decree, nor had they any authority to advertise the sale until their bond was filed and approved.

We do not consider the adverse case decided by Chancellor JOHNSON in 4 *Md. Ch. Dec.*, 309, to be analagous to the present. Because the purchaser sought to avoid the sale which was advantageous to the parties in interest, and being advantageous to the parties in interest, they could hold the purchaser to it on the case of *Glenn vs. Clapp*, 11 *G. & J.*, 8. Nor do we think that this decision of the distinguished Chancellor was made with his usual care and investigation. He seems to have overlooked the fact that irregularity would vitiate the proceeding, because the foreclosure was under a special jurisdiction, and without notice to the mortgagor. The case decided by this Court in 5 *Md. Rep.*, 163, seems to conflict fatally with this decision of the learned Chancellor, which is opposed to the whole current of authorities. It matters not in what part of the proceedings irregularity is found, the effect is to vitiate the whole. Here the decree of sale expressly requires that "they shall first file a bond," &c., "and then proceed to make the sale, having given at least

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three week's notice," &c. The plain import of this decree is that they shall do nothing until they give approved bond, and it is a fatal departure from the decree that they advertised the sale before they had bonded.

4th. There is no proof that the sale was advertised for three weeks, as required, except the general recital in the reports of sales "that having, in all respects, complied with said decree, they did pursuant to previous notice," &c. There is no direct affirmation that they advertised for three weeks as required, and they might be mistaken when they report a general compliance.

The Supreme Court of the United States have held that the general recital in the deed of the marshal who had sold for taxes, that he had complied in all respects, was not sufficient evidence of such compliance in a summary proceeding of that character. 4 *Wheaton*, 75. And this case in 4 *Wheaton* is a strong authority to show the necessity of a strict observance of all the requirements in summary proceedings of this character. We also refer on the same point to *Games vs. Stiles*, 14 *Peters*, 331. These views show that the Court erred in overruling the 1st, 2nd and 3rd exceptions. And also erred in overruling the last exception filed.

5th. The trustees failed to meet by proof our 4th exception, which assails the advertisement, because it was altered two weeks before the sale. If the facts were as alleged in this 4th exception, the advertisement was fatally defective, and there should have been proof of its having been duly published for the length of time required by the decree, as the *onus* was on the trustees to overcome our exception by proof, and yet the Court overruled the 4th exception without any proof whatever being adduced to support the correctness of the advertisement thus put in issue. If the advertisement in one of the newspapers,

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notified the sale for the 9th day of December, 1863, instead of 1862, it was clearly prejudicial to the sale. *Rawlings vs. Adams*, 7 *Md. Rep.*, 44, *Act of* 1836, *Ch.* 249.

6th. The Court erred in overruling our sixth exception, and first and second additional exceptions for the reasons therein stated. Our first additional exception was right and should have been sustained. The annuity or sub-rent of $26.25 appears to have been advertised and sold, but not the ground rent out of which it issued. The trustees had no right to make such a severance; and the lot now stands in this condition; that the administratrix of Lawn holds all the interest that a sub-lessor has, except the mere right to the naked annual sum of $26.25. If the purchaser ever has more than this right, he must get it by a deed from the trustees, or by enforcing the execution of such a deed, by a proceeding in equity. How far this mistake may have affected the bidding can only be matter of conjecture.

Our second additional exception should have been allowed, because the advertisement of the fourth piece of property does not coincide with the deed.

1st. Because it describes the property as binding from a certain corner, south-westerly on Ross street, while the deed makes it bind north-westerly.

2nd. Because it runs the second line parallel with Union street one hundred feet, which is wholly variant from the line in the deed.

Such defects must seriously have affected the biddings—they are covered by the terms of our second additional exception, and if not sufficiently pointed out, this Court must look to the regularity of all the proceedings on the question of jurisdiction.

Again, the report of sales states that there were six instead of five houses, on the seventy-three feet lot on Ross street, thirdly described, but the advertisement

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places the five buildings on the Biddle street property, secondly described. If this report be true, there were no improvements in fact on the Biddle street property, secondly described, or if there were such improvements they are not properly described. Besides, this lot is advertised as subject to a ground rent with the next below described lot of $100, whereas the deed shows it is subject alone to a ground rent of $65.50.

In conclusion, we observe that all proceedings in which no notice is given, are void, so far as they operate *in personam*. 14 *How.*, 334. 6 *How.*, 186. 5 *Johns.*, 57. And the Court has decided the same principal in *Clarke & Jackson vs. Bryan et al.*, 16 *Md. Rep.*, 178.

It therefore results that in a proceeding *in rem* there must be the strictest compliance with the directions of the law. No man's property can be taken from him without an opportunity or notice to him, that he may intervene for the protection of his rights. 5 *Wendell*, 157. 14 *How.*, 341. *Flowers vs. Forman*, 23 *How.* The allegation of a jurisdictional fact on the record does not estop a party from controverting the jurisdiction. 5 *Wendell*, 161. 4 *Connecticut Rep.*, 280. The purchaser in such a case buys at his peril. *Hollingsworth vs. Barbour*, 4 *Peters*, 475. In proceedings *in rem* the seizure gives jurisdiction, but here there being no seizure, in fact, the only ground for jurisdiction is in a strict observance of all legal requisites.

Thomas Donaldson and J. J. Snyder, for the appellee, argued:

1st. That the trustees named in the decree in this case, conformed their action and proceedings to the requirements of said decree and the law, and will here maintain that their bond was filed in abundant time. *Speed vs. Smith & Boyle*, 4 *Md. Ch. Dec.*, 299.

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2nd. That the advertisement relied upon by the exceptants as defective, is regular, and a sufficient compliance with said decree. 2 *Md. Code, Art.* 4, *secs.* 786, 787. *Hays vs. Dorsey*, 5 *Md. Rep.*, 99. *Robertson vs. Am. Homestead Association*, 10 *Md. Rep.*, 407.

3rd. That if exceptions numbered 4th, 7th and 9th, could avail the exceptants, if made out, still there is no evidence to sustain them or either of them. 2 Code, Art. 4, secs. 786, 787.

4th. That if it be true as stated in exception 6th, that said ground was advertised as being subject to a lesser rent than was actually reserved, yet that this furnishes no ground to set aside the sale, provided the purchaser makes no objection, as in this case.

5th. We contend, that under the existing Statutes of Maryland it was perfectly competent for the mortgagee to apply for and obtain his decree, at the time and in the manner and form in which he did, and that the case of *Kenly vs. Wierman's Exc'rs*, 18 *Md. Rep.*, 302, does not hold a different doctrine. *Hays vs. Dorsey*, 5 *Md. Rep.*, 99. *Ing vs. Cromwell*, 4 *Md. Rep.*, 31. *Art.* 4, 2 *Code*, 782. 1833, *ch.* 181. 1839, *ch.* 9, *sec.* 3.

6th. That the affidavit of the amount due on said mortgage is pursuant to law, both as to time and form. *Ing vs. Cromwell*, 5 *Md. Rep.*, 99. *Gatchell vs. Presstman et al.*, *Id.*, 163. *Robertson vs. Am. Homestead Association*, 10 *Md. Rep.*, 407. *Cunningham vs. Schley*, 6 *Gill*, 207. A trustee's sale may be ratified though the terms prescribed by the decree may not have been complied with, if the reasons for the ratification are more satisfactory than those offered against it.

Exception numbered 5th, of original, and No. 1, of additional exceptions, have no application to this appeal.

Weisel, J., delivered the opinion of this Court.

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The principal exception to the sales reported in this case, and ratified by the Court below, is that which denied the jurisdiction to it to pass the decree, on the ground that the period limited in the mortgage for its forfeiture had previously expired, and that under the provisions of the Code referred to in the mortgage, no decree could take place except at a time prior to such forfeiture.

This Court has already disposed of this question in the appeals of *Black vs. Carroll*, and *Frank vs. The Teutonia Building Association* at the last term, (*ante pp.* 251 & 259) in which it held that decrees passed after default were within the meaning and purview of the provisions of the Code upon this subject, and can be sustained. We need only here refer to the opinions of the Court filed in those cases for its views on this question.

We also think that the affidavits of the mortgagee filed in the case were in compliance with the Code requiring such a verification of the amount due upon the mortgage. It was made at the time the petition was prepared, and filed with it, and after the forfeiture of the mortgage, and consequently before the time of sale. The purpose of the provision was accomplished by it—a sworn statement of the amount due after the forfeiture and before the time of sale. 5 *Md. Rep.*, 163. 10 *Md. Rep.*, 407.

The trustees did not file their bond until the day on which they advertised the sales to take place, the decree prescribing that they should first file a bond to be approved, and then proceed to make sale, having given at least three weeks notice, &c. And it is objected that this was a fatal irregularity, at variance with the terms of the decree. Neither the language of the Code (sec. 783,) nor that of the decree requires the filing of the bond before publishing of the advertisement of sale. Looking at both, the filing of the bond on the day of, but before the sale, might be regarded as no deviation from either. But we

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think the late Chancellor JOHNSON, of this State, has furnished the true grounds and reasons for meeting the objection in a case of trusteeship like this. The trustee in this case was the agent and appointee of the Court, and a strict observance of its terms may be dispensed with in this as well as other particulars, in proceeding to ratify a sale made by him, care being taken that the requirements of the law are substantially complied with, and the interests of all parties fully protected. *Speed vs. Smith*, 4 *Md. Ch. Dec.*, 309, 310. In this case a bond was filed and approved before the sales were made.

We agree also with the Court below that the inadvertence of advertising one of the lots as subject to a ground rent of sixty-five dollars, instead of sixty-five dollars and fifty cents, the true rent, had no tendency to injure its sale. On the contrary, its tendency would be to improve it, and the purchaser, if any one, would be the party most apt to complain. He is not before the Court as an objector, and the matter furnishes no adequate ground for interfering with the sale.

The 4th exception, relating to an error in the year in the advertisement published in one of the newspapers selected by the trustees, presents an irregularity which, like that of the bond, the Court could overlook on the ratification. The advertisement in one of the newspapers is without exception, and by the terms of the decree a publication of the notice in one daily newspaper would have been sufficient. The mistake, however, in the one objected to was of such a nature as not to mislead any one of ordinary care in its perusal.

We think there is nothing material in the other objections to the sale, and that the order of the Court below, from which the appeal was taken, should be affirmed, with costs to the appellee.

Order affirmed, and cause remanded.

(Decided April 26th, 1866.)

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In the Matter of the Trust Estate of Murray and Hazlehurst.—Register and Webb *vs.* Compton Spencer.

Evidence: Usage: Meaning of the term Borrowed Money: Admissibility of Parol Evidence to aid in the Construction of Deeds.—A deed of composition with creditors contained a provision for the payment of "all borrowed money and accommodation notes, and then all notes which were originally given in the course of business, and have been extended by the holders thereof," &c. On exceptions taken to the claim of a creditor allowed as if *borrowed money*, upon the ground that it was not "borrowed money" within the terms of this deed, Held:

1st. That the words "all borrowed money," include, in ordinary popular sense, all sums of money loaned by a creditor to a debtor, without regard to the mode, or the existence of any security or evidence of indebtedness. And there being nothing in the context to limit the meaning of the words, it was incumbent on the exceptant to establish by clear satisfactory proof, that the terms used have acquired and were used in a technical or peculiar sense.

2nd. An usage to be admissible must be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform.

3rd. These principles apply as well to the admission of parol proof by the Court in aid of the interpretation of a deed, as to the admission of such proof when offered to establish the meaning of a contract, to be submitted under the directions of the Court to a Jury.

4th. Where a debtor executes a deed of composition with his creditors, the discussions among the creditors, and their impressions about the claim of one of the creditors, before accepting the deed, and afterwards cannot be allowed to control its interpretation and construction, in the absence of all charges of fraud in procuring the composition.

Appeal from the Circuit Court of Baltimore City.

The facts of this case are sufficiently stated in the opinion of the Court.

This cause was argued before Bowie, C. J., and Bartol, Goldsborough and Weisel, J.

Geo. Wm. Brown and *F. W. Brune*, for the appellants, argued:

1st. That the evidence of these witnesses, with the other proof in the record, was competent testimony to

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show that the words, "borrowed money," had a technical and peculiar meaning amongst the merchants and business men of Baltimore, and were used in this technical and peculiar sense by the grantors in this deed, and that such evidence does not contradict or vary the deed, but only explains this phrase contained in it.

2nd. That such evidence may as well be applied to explain a term in this deed, as in any mercantile contract.

3rd. That from the face of the deed, aided by the proof, it is sufficiently apparent that the loans of the appellee, constituting his claim for $10,000 and interest, should not be embraced under the term borrowed money, and preferred in the creditor's account. The appellants refer to the following authorities: *Powell on the Law of Evidence*, 345, 351. (96 *Law Lib.*, 222, *et seq.*) *Shaw vs. Wilson*, 9 *Clarke & Finelly*, 525, 528, 555, 566. *Wigglesworth vs. Dallison*, 1 *Smith, Le. Ca.*, 305. (43 *Law Lib.* 410.) *Dorsey vs. Eagle*, 7 *G. & J.*, 331. *Williams vs. Woods*, 16 *Md. Rep.*, 251. *Brooms' Legal Maxims*, 294. (50 *Law Lib.*, 192.)

George H. Williams, for the appellee, contended:

1st. That a deed is a common law instrument, and is to be interpreted according to the received meaning of words, and that no attempt can be permitted to graft an ambiguity upon, and distort the meaning of simple English as understood by the whole world, when used in such an instrument or elsewhere.

2nd. That the deed of a merchant is not to be interpreted differently from that of any other grantor; and that to make the occupations in life of grantors a key to the meaning of words, and to give them a narrow and restricted meaning, especially when free from ambiguity, is a novelty hitherto unheard of.

3rd. That a custom and usage of merchants so to use

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the words "borrowed money," in their deeds, even could such a thing be proved, cannot be made to apply to the deeds of machinists; and so to construe deeds would unsettle grants to a frightful extent; and in searching titles parties would have to go outside of deeds and find out the business occupations of grantors, and then also inquire whether any such occupations had established a custom and usage to distort or narrow the meaning of plain, simple, unambiguous English. *Williams vs. Woods, et al.*, 16 *Md. Rep.*, 251. *Foley et al., vs. Mason*, 6 *Md. Rep.*, 49.

Bowie, C. J., delivered the opinion of this Court.

This appeal involves the true construction of a deed of composition with creditors, made by Murray & Hazlehurst to Messrs. Abbott, Keyser and Rogers, on the 18th of February, 1861. After collecting all outstanding debts, and selling and disposing of the property conveyed to them, the trustees are required to apply the proceeds among certain classes of creditors as follows, viz:

1st. To discharge the interest due on all mortgages, together with the ground rent, taxes and insurances accruing or incurred while the property was in the possession of the trustees.

2nd. To pay wages or hire of all agents or workmen due and accruing during the continuance of the trust.

3rd. To pay out of the surplus "all borrowed money and accommodation notes," and then all notes which were originally given in the course of business and have been extended by the holders thereof, etc.

4th. To pay individual creditors of partners out of their individual estates.

5th. To pay to such creditors as shall within sixty days signify their assent and execute a release.

The appellee filed his claim under this deed in the form

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of an open account against Messrs. Murray & Hazlehurst, debiting them as follows:

1857, March 2nd. To this amount of money borrowed of me by them..... $10,000
Interest until paid.....
1859, Nov. 19th. This amount of money borrowed of me by them..... 351
Interest until paid.....

To which is annexed the affidavit of the creditor and one of his debtors, "that the account is just and true."

This claim was allowed in account C as a claim for borrowed money entitled to preference as such, under the third class of crediting. To which the appellants excepted, contending that said claim should be classified with the general creditors of Murray & Hazlehurst. This is purely a question of interpretation and construction. "The terms of every written instrument are to be understood in their plain, ordinary and popular sense, unless they have acquired, by known usage, a peculiar sense, or unless the context points out that in the particular instance, in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense." 1 *Greenlf. Ev.*, *sec.* 278. In Broom's Legal Maxims, upon the authority of a very eminent Judge, it is said: "The true interpretation of every instrument, being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has been always considered an exception from, or perhaps to speak more correctly, not so much an exception from as a corollary to the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence, *dehors* the instrument itself,

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for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party." TINDAL, *C. J.*, 5 *Scott N. R.*, 1037, 1038.

The question then recurs, is there any doubt about the true sense of the words of the third clause.

The words, "all borrowed money," would seem at first view incapable of misconstruction. They include in ordinary, popular sense all sums of money loaned by a creditor to a debtor without regard to the mode or the existence of any security or evidence of indebtedness. If there had been money borrowed, secured by mortgage, bond, bill or note, or without any such security, the comprehensive monosyllable *all* would embrace it, unless there is in the deed some qualifying clause. We look in vain to the context for such a limitation. It is then incumbent upon the exceptant to establish by clear, satisfactory proof that the terms used have acquired and were used in a technical or peculiar sense. Without excluding the evidence of usage to explain words of equivocal import in mercantile and other instruments, the decided tendency of the most eminent Judges is to restrain rather than encourage it. Justice STORY, in 2 *Sumner*, 567, deprecates the practice, and says: "I rejoice to find that of late years the Courts of law, both in England and America, have been disposed to narrow the limits of the operation of such usages and custom and to dicountenance any further extension of them." This Court, in the case of *Foley & Woodside vs. Mason, etc.*, 6 *Md. Rep.*, 50, quote the energetic language of C. J. TILGHMAN, in which he says: "Miserable will be our condition if our property is to depend, not on the contract of the parties, expounded by established principles of law, but what is called the custom of particular places, so that we may have different laws in every town and village." And they decide an "usage to be admis-

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sible, must be known to the parties or be so general and well established that knowledge and adoption of it may be presumed ; and it must be certain and uniform."

These principles apply as well to the admission of parol proof, by the Court, in aid of the interpretation of a deed, as to the admission of such proof, when offered to establish the meaning of a contract, to be submitted under the direction of the Court to a jury. In this case the meaning of the term or phrase " borrowed money," as sought to be established by the usage among merchants in Baltimore, is not shown to be so certain and uniform as to be capable of practical application. The testimony is inconsistent and contradictory. In one place "borrowed money" is defined as money loaned on call for which "no charge is made." In another, "if a person ask me to take money on interest for fifteen or twenty days it would be borrowed money." In another, "if money is loaned for twelve months on interest it is not a debt of honor, nor if loaned for an indefinite time." Again, "if a party lends me money for my accommodation, trusting to my honor, for an indefinite time, I consider it a debt of honor."

These definitions of "borrowed money" have no fixed invariable quality by which to establish the peculiar meaning of the words. Sometimes it is, the loan being on call, "without interest;" then it may be with interest for fifteen or twenty days if offered by the lender; if loaned for twelve months on interest, or an indefinite time, it is not in their sense borrowed money according to the usage of merchants. A standard so variable is incapable of application and cannot control the well understood meaning of words. But if such testimony were admissible for the purpose, there is nothing to show the appellees' claim was not borrowed money in their sense. One of the debtors says the appellee loaned

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the firm $10,000, he could not then give the details. Sometimes they were in the form of notes, which were afterwards canceled; "the matter extended over three or four years;" the lender was the clerk of the firm, had expectations of being taken into the co-partnership; after that was abandoned it was proposed to give him a mortgage, which he relinquished in favor of another party so that his debtors might raise more money.

Could any circumstances constitute a debt of honor if these fail? With most unbounded disinterestedness he placed his whole claim upon the word of his debtors, declining all security and preferences.

There is some discrepancy in the evidence as to the mode in which the debt was contracted and the inducements to the loan, but this is not sufficient to countervail the concurrent testimony that the amount claimed was lent and advanced, which, according to the usual meaning of the words "borrowed money," brings the claim of the appellee within the third class of creditors. In either view, whether considered in its enlarged or more restricted sense, it was properly allowed.

The discussions among the creditors, and their impressions about the appellee's claim before accepting the deed, and afterwards, cannot be allowed to control its interpretation and construction in the absence of all charges of fraud in procuring the composition.

We think the order of the Court below, overruling the exceptions of the appellant, and ratifying account C, should be affirmed with costs to the appellee.

Order affirmed.

(Decided April 28th, 1866.)

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THOMAS MATTHEWS, JOSEPH MATTHEWS, JAMES MURRAY, AND OTHERS, *vs.* AUGUSTUS J. ALBERT AND OTHERS.

CORPORATIONS: INDIVIDUAL LIABILITY OF STOCKHOLDERS UNDER THE ACT OF 1852, CH. 338, SEC. 9: RECOUPMENT: PRACTICE IN EQUITY: CONTRIBUTION.—A company was incorporated under the provisions of the Act of 1852, Ch. 338, the 9th section of which provides, that the stockholders "shall be severally and individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, one-half thereof in one year, and the other half thereof within two years from and after the incorporation of said company, or such corporation shall be dissolved." On a bill filed by creditors of the company to make certain of the stockholders liable under this clause, the latter, besides a general denial of liability, sought to set off the amount of certain loans made by them to the company, against the claims of the creditors, HELD:

1st. That though the doctrine of recoupment might properly arise between the company claiming the payment for stock subscribed, and the stockholders who had loaned money to the company, to an amount equal to their stock, or had paid debts of the company to that amount, it by no means follows, that the stockholders are absolved from liability to the creditors of the company.

2nd. The statute does not refer to them in their corporate capacity, but as individual stockholders; and it declares their liability without reference to the amount they may have paid in on their stock.

3rd. If the stockholders had paid for their stock, and *subsequently* became creditors of the company to an amount equal to their stock, by so doing they would be clothed with equities equal to any other creditors who may have become so by contracts with the company.

4th. That the stockholders were not liable for debts contracted by the company subsequent to their parting with their stock.

5th. That a creditor of the company who receives stock from the company as collateral security for his loan, is not personally subject to any liability as stockholder, but is protected by the provision of the 13th section of the Act of 1852, Ch. 338.

6th. That this proceeding being in equity, where the liability of the several defendants may be ascertained and enforced with respect to each other, each of them may insist upon contribution from the others, and such other of the stockholders as are liable under the statute should be made to contribute rateably their proportion of the complainants' claims.

APPEAL from the Superior Court of Baltimore City.

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The facts of this case are stated in the opinion of this Court.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

George H. Williams for the appellants, argued:

1st. That the 9th section, of the Act of 1852, ch. 338, makes all the shareholders, "severally and individually liable" to an amount equal to their stock, unless the capital be paid in as therein prescribed.

2nd. That sec. 12, of said law, peremptorily declares "that nothing but money shall be considered as payment of any part of the capital stock."

3rd. That sec. 13 provides that no person holding such stock as collateral security shall be personally subject to any liability as stockholders of such company; but the person pledging the stock shall be considered as holding the same, and shall be liable as stockholders accordingly.

4th. That the prayer of the bill suffices to cover responsibility for all indebtedness of the company, certainly up to the 29th of January, 1859, and further, if any liability exists by the true construction of the 9th section of the Act; and it is submitted the liability by it is not restricted to debts while the defendants were shareholders, on the contrary, in the event of the capital not being paid in, all the stockholders (without saying at what time they must be such) are to be liable. The proof shows the indebtedness to have existed at the time the Alberts were shareholders, except the sum of $263.77 due to Murray & Hazlehurst, and this amount is too trifling when compared with the rest of the debts to be worth much controversy; all the residue of the indebtedness beyond doubt existed while the Alberts' held the stock.

5th. That as nothing but money can be considered as

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payment for stock, how stand the Alberts? Usury is not payment in money. The Legislature stipulated in these charters (for the protection of creditors and the community) for actual *cash*, and which was to be paid within a *certain time*.

Taking stock from the company at an usurious *bonus* on a loan to the company, is not paying in money for its capital stock. William J. Albert therefore owes for his stock $12,000, and for his liability under the 9th section $12,000 more, say $24,000. Now assuming the case cited, *Garrison vs. Howe*, 14 *N. Y. Rep.*, to be good law (and which is denied), after crediting him with his claim of $12,000 as a creditor of the company, he is still liable for the remaining $12,000.

So with A. J. Albert, he is liable for $1,500 for his stock; and for his liability under the 9th section for $1,500 more. And after, in like manner, crediting him with his claim, as creditor, he also yet remains liable for $1,500.

6th. That there can be no pretence upon the proof that Tiernan ever was, or meant to be anything but a creditor holding stock as a collateral security, and exonerated from all liability by the thirteenth section; that a corporation may pledge its own stock, and that the word "person" includes "corporations." *Angel and Ames on Corp. The Germania vs. The State*, 7 *Md. Rep.*, 6.

And further, that said stock was issued to Tiernan without his knowledge, and in the hope that he would also take it as usury; but that so soon as sent to him and before the maturity of the loan, he returned it for the purpose of having the truth endorsed on it, declining the usury. There is no proof in the cause that anything was said to him about taking it as a *bonus*. On the contrary he would not hold it as issued.

7th. That the object of the appellees as endorsed by the

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decree below is to add to the simple and plain language of the Act of Assembly, words not placed there by the Legislature, and such as the following: Provided, however, that if any stockholder pays in his proportion of the capital stock within the time prescribed, he shall not be further liable, and provided also that if liable, stockholders may offset to the claims of creditors seeking to make them liable, any demands of their own against said company, though the capital be not so paid in. And provided also, that furnishing commodities to such company or usury charged to it, shall be equivalent to money, and considered as money paid in, the 12th sec. of this Act, to the contrary notwithstanding. Upon the construction of statutes, see *Abley vs. Dale*, 73 *Eng. C. L. Rep.*, 390. *Allen vs. Mutual Fire Insurance Co.*, 2 *Md. Rep.*, 111. *Collins admr. vs. Carman's Exc'r*, 5 *Md. Rep.*, 529. *Alexander vs. Worthington et al.*, *Id.* 485. *Scaggs vs. Balto. & Wash. R. R. Co.*, 10 *Md. Rep.*, 277. *Frazier vs. Warfield*, 13 *Md. Rep.*, 301. *State vs. Wayman*, 2 *G. & J.*, 254.

J. Mason Campbell and *Bernard Carter* for the appellees.

The alleged liability of the defendants grows out of the provisions of the Act of Assembly of Maryland of 1852, ch. 338; the 9th section of this Act is in these words:

"*And be it enacted*, That all the stockholders of every company incorporated under this Act, shall be severally and individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock, fixed and limited by such company, shall have been paid in, one-half thereof in one year, and the other half thereof within two years, from and

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after the incorporation of said company, or said corporation shall be dissolved."

The prayer of the bill of complaint in this case is, "that the liability of the defendants may be decreed as to debts created while they were stockholders." The complainants must therefore establish, that the Alberts were stockholders of the "Coal Oil and Paraffine Company," and that the debts of the complainants were created while they were such stockholders.

W. J. Albert first became a stockholder on the 12th of October, 1858, when he took 80 shares; on the 12th of November, 1858, he took 400 shares; and on the 7th of December, 1858, he took 40 shares. He ceased to be a stockholder on the 29th of January, 1859. Augustus J. Albert first became a stockholder on the 15th December, 1858, when he took 60 shares; and ceased to be a stockholder on the 29th of January, 1859.

Each of the complainants must therefore show, in order to recover against William J. Albert, that their debts were contracted between the 12th of October, 1858, and 29th of January, 1859; and as to Augustus J. Albert, that the said debts were contracted between the 15th of December, 1868, and 29th of January, 1859.

We have said that the prayer of the bill limits the liability of the stockholders to debts of the company contracted while they were stockholders. That this is the limit of their liability, see *Holyoke Bank vs. Burnham*, 11 *Cushing*, 183. *Curtis vs. Harlow*, 12 *Met.*, 3. *Moss vs. Oakley*, 2 *Hill*, 265, 268. *Tracey vs. Yeates*, 18 *Barb.*, 152, 154. *Adderly vs. Storm*, 6 *Hill*, 624. *Garrison vs. Howe*, 17 *N. Y. Rep.*, 465. See also 9 *Cush.*, 199.

It will hardly be contended we suppose by the complainants, (though hinted at in the bill,) that the transfer of their stock by the Alberts, on the 29th of January,

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1859, did not divest them of their interest in the stock, nor end their liability under the statute, so far as any are concerned who became creditors of the company after the 29th of January, 1859. There is nothing in the language of the Act of 1852, ch. 338, which compels those who become stockholders, always to remain so; and whatever might be the principles of law governing the case of a stockholder who should transfer his stock to an insolvent, for the purpose of defeating creditors, it is sufficient for this case to say, that there is nothing in this record which gives any such character to the transfer of this stock by the Alberts.

That a stockholder in these manufacturing corporations may transfer his stock, and so end his connection with the company and his liability for its debts, subsequent to the date of the transfer, see *Angell & Ames on Corp.*, *sec.* 534. *Holyoke Bank vs. Burnham*, 11 *Cushing*, 183.

But secondly, we contend that upon a proper construction of the Act of 1852, ch. 338, considered in connection with the facts in the case, neither of the complainant creditors can recover against either of the Alberts. The relation of each of the Alberts to the company is two-fold; they are stockholders in the company, and at the same time they are creditors of the company. The amount of stock held by William J. Albert, in the company, was 520 shares, which, at $25 *per* share, is $13,000. The 9th section of the Act of 1852, ch. 338, makesthe amount of stock held, the measure of the liability of the stockholder to the creditor of the company. If, therefore, the only relation which W. J. Albert occupied to the company was that of stockholder, he would be liable to the creditors of the company to discharge the debts due by it to them, to the extent of $13,000. But W. J. Albert is a creditor of the company to the amount of $13,000, for money loaned and which was appropriated to the payment of the debts of the company from time to time.

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We contend, therefore, that though bound as stockholder to discharge the debts of the company to the extent of $13,000, yet that in point of fact he has fulfilled this duty by paying the debts of the company, by advancing the $13,000, the advancing of which constitutes him a creditor. *Garrison vs. Howe*, 17 *New York*, (3 *Smith*,) 461. *Bank of Poughkeepsie vs. Iverson*, 24 *Wend.*, 479. See also 4 *J. J. Marshall*, 1.

But, 3rd, we contend that William and Augustus Albert, as creditors, are entitled to stand on the same footing, and share with the complainants in any recovery which may be had against the stockholders in the company, the Alberts themselves included. *Briggs vs. Penniman*, 8 *Cowen*, 387 *and* 392.

4th. We have been so far considering the right of the complainant creditors to recover their respective debts as if the rights of each stood on the same basis.

We insist, however, that William H. Tiernan, one of the complainants, is not a non-stockholder creditor, but is a stockholder in the "Coal Oil and Paraffine Company," and as such, is to the extent of his stock, as much liable to the non-stockholder creditors as are the Alberts. Tiernan supposes that he is relieved from any responsibility as stockholder by the 13th section of Act of 1852, ch. 338, and that he stands as a creditor of the company, and on a *par* with other creditors who are not stockholders.

The evidence in the cause shows that on the 8th of January, 1859, a certificate of stock in the usual form of certificates of this company, and absolute on its face, was issued to William H. Tiernan for 80 shares, which certificate was delivered to Tiernan and held by him without objection or exception, till more than a month after the 8th of January, 1859; after which interval, on application to the President of the company, this certificate was endorsed by the latter in words declaring that said certificate had

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been deposited with Tiernan as collateral security for the payment of a loan of $2,000 made by said Tiernan—the certificate to be returned on payment of the loan. Now we contend: That the 13th section of Act of 1852, ch. 338, does not refer to the case of a person taking stock from the company as collateral security for a loan made to it by such person, when it declares that "no persons holding stock as collateral security shall be personally subject to any liability as stockholders of such company."

GOLDSBOROUGH, J., delivered the opinion of this Court.

On the 1st of September, 1858, the "Coal Oil and Paraffine Company of Baltimore," became incorporated in accordance with the provisions of the Act of 1852, ch. 338. Soon after the organization of the company, it incurred sundry liabilities, and amongst them, the claims alleged to be due to the complainants named in the bill of complaint in this case. Judgments were obtained by the complainants against the company on their claims. Executions were issued thereon, and were returned *nulla bona*. Being, as they allege, without remedy, except in a Court of Equity, and having discovered that the appellee, Wm. J. Albert, had become a stockholder of the company to a large amount of shares, the complainants seek by this bill to recover their claims from him under the provisions of the 9th section of the Act of 1852, ch. 338.

This bill was subsequently amended by making the corporators and Augustus J. Albert, (who had become a stockholder) parties defendant.

The corporators suffered a decree *pro confesso* to go against them. In this state of the case, it was "agreed that the question of the liability of the defendants other than William J. Albert and Augustus J. Albert, shall be postponed until the determination of the liability of

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the said Alberts, and that any decree passed in regard to the liability of said Alberts may be taken to the Court of Appeals, to be there decided without objection, either in this Court or in the Court of Appeals, on the ground that the liability of the other defendants is left undetermined by said decree. The responsibility of the Alberts is claimed upon the ground, that under the terms of the 9th section of the above Act, they, as stockholders, were "severally and individually liable to the creditors of the company to an amount equal to the amount of the stock held by them respectively, for all debts and contracts made by such company, until the whole amount of the capital stock, fixed and limited by such company, shall have been paid in; one-half thereof in one year, and the other half thereof within two years, from and after the incorporation of said company, or such corporation shall be dissolved."

The claims sought to be recovered in this suit, were contracted while the Alberts were stockholders.

Though the doctrine of recoupment, upon which the bill in this case was dismissed, might properly arise between the company claiming the payment for stock subscribed, and the stockholders who had loaned money to the company to an amount equal to their stock, or had paid debts of the company to that amount, it by no means follows, that the stockholders are absolved from liability to creditors of the company. This responsibility is absolutely fixed by the Act of 1852, from which there is no escape, until the provisions of the 9th section are complied with, and it is not pretended that such is the case.

The defendants occupied the two-fold relation of debtors to the company for the amount of their stock at par value, and as debtors under the Statute, to the creditors of the company to an amount equal to their stock, for all debts and contracts created while they were stockholders. In *Briggs vs. Penniman*, 8 *Cowan*, 396, the Court say, "the

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Statute does not refer to them in their corporate capacity, but as individual stockholders; and it declares their liability, without reference to the amount they may have paid in on their stock."

In this connection, it is proper to say that in the terms which controlled the decision, the Statute of N. Y. is substantially the same as the Act of 1852, ch. 338.

The Judge of the Superior Court has correctly construed the decision in *Garrison vs. Howe*, 17 *N. Y. Rep.*, 462, that if the stockholders had paid for their stock, and *subsequently* became creditors of the company to an amount equal to their stock, by so doing they would be clothed with equal equities to any other creditors who may have become so by contracts with the company. This theory is sustained by the case of *Briggs vs. Penniman*, before referred to. But the Alberts cannot claim to hold this relation, as they have never paid anything for their stock according to the evidence in the cause. It appears from the record that William J. Albert became the owner of 480 shares of stock, equal to $12,000, between the 3rd of October, 1858, and the 5th of November of the same year, and that Augustus J. Albert became the owner of 60 shares, equal to $1,500, on the 6th of December, 1858. Both of these defendants parted with their stock on the 29th of January, 1859.

According to the evidence of Samuel M. Dukehart, the claim of the appellants, Thomas and Joseph Matthews, consisted of a judgment on a note of the company for $1,092.40, given on the 1st of January, 1859, and a bill of lumber furnished the company between the 4th and 15th of January, 1859.

The claim of Murray & Hazlehurst consisted of a judgment on a note of the company for $2,238.20, issued on the 1st of January, 1859, and an open account for mate-

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rials furnished between the 21st of January, 1859, and the 30th of March of the same year.

These claims are proved by Compton Spencer. But as it does not appear from the evidence what portion of the account was contracted before the Alberts parted with their stock on the 29th of January, 1859, the account is not so proved as to justify its allowance.

The claim of W. H. Tiernan is for $2,000, money alleged to be loaned to the company on the 8th of January, 1859, and is proved by James C. Barry. But it is insisted by the appellees that Tiernan, instead of being a non-stockholder creditor, is, according to the evidence, a stockholder, and as much liable as the Alberts. We do not concur in this view of the relation of Tiernan to the company. In our opinion his claim is for money loaned, and the stock transferred to him was held by him as collateral security for his loan, and so holding it, he is not personally subject to any liability as stockholder, but is protected by the provision of the 12th section of the Act of 1852, ch. 338.

According to our construction of the 9th section of this Act, we think the appellees, the Alberts, are severally and individually liable for the claims of the appellants, to the extent of their stock, except the claim of Murray & Hazlehurst for $263.77. This construction is sustained by the case of *Briggs vs. Penniman*, in which the Court say, "every stockholder in a company of this description incurs the risk of not only losing the amount of stock subscribed, but is also liable for an equal sum, provided the debts due and owing at the time of dissolution are of such magnitude as to require it."

In construing the 9th section of the Act of 1852, it is manifest that the Legislature designed to protect creditors of the company from loss. The language is unequivocal, and clearly intends that until the amount

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of all the stock is paid up, the stockholders shall be respectively liable to the creditors of the corporation to an amount equal to the whole of the stock respectively held by them. The proceeding here, however, is in equity where the liability of the several defendants may be ascertained, and enforced with respect to each other, and when each of them may insist upon contribution from the others; and as it is just and proper that such other of the stockholders as are liable under the Statute, should contribute rateably their proportion of the complainants' claims, we will sign a decree reversing that of the Court below, and remand the cause, that an account may be stated in conformity with this opinion.

Decree reversed, with costs to the appellants, and cause remanded for further proceedings.

(Decided May 1st, 1866.)

SAMUEL A. DAVIDSON *vs.* CHARLES H. MYERS AND ALEXIUS J. MYERS.

LIEN OF JUDGMENT: INTERLOCUTORY AND FINAL JUDGMENT.—A judgment by default was entered on the 15th of January, 1862, and final judgment for the amount of the claim with interest was entered up on the 30th of October, 1862, HELD:

1st. That this judgment could not in the nature of things relate back and take effect as of the date of the judgment by default; nor could the judgment by default, in establishing the jurisdiction of the Court and the simple fact of the plaintiffs right to recover, be said or understood to constitute a recovery.

2nd. That treating the judgment by default as interlocutory merely, it could not operate as a lien on the real or leasehold property of the defendant.

The Act of 1861, Ch. 70, declares that judgments shall be liens *for their amount* and *from their date*, HELD:

That by this provision final judgments alone were contemplated.

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Davidson *vs.* Myers et al.

APPEAL from the Superior Court of Baltimore City.

On the 14th of December, 1863, the appellant filed his bill of complaint in the Superior Court of Baltimore City, stating as follows:

"That at January Term, 1862, of the Court of Common Pleas for Baltimore City, your orator obtained a judgment by default against a certain William Rogers, which was afterwards extended by the agreement of the parties on the 30th day of October, 1862, for the sum of $277.50 cts., with interest from the 24th day of October, 1862, and costs, that on the 18th day of August, 1863, your orator caused a writ of *fieri facias* to be issued on said judgment, which was duly executed by levying the same on certain leasehold estate belonging to said Rogers, lying on Hoffman street, in the City of Baltimore, and by a sale thereof, at public sale to your orator, all of which will more fully appear by a short copy of the docket entries in said Court of Common Pleas, herewith filed, marked A, and by a copy of the Sheriff's deed herewith filed, marked B, and prayed to be taken as part hereof.

"That all said proceedings were regular and *bona fide* on the part of your orator, and as he charges, vested a perfect legal title in him, and he especially avers that the judgment as finally extended as aforesaid, was for the real debt due by said Rogers to your orator, and for which he held the note of said Rogers. Your orator further showeth, that on the 9th day of September, 1862, a certain Charles H. Myers and Alexius J. Myers, who are prayed to be made defendants hereto, obtained a judgment against said Rogers in your honorable Court by confession, as appears by the short copy thereof herewith filed, marked C, and prayed to be taken as part of this bill of complaint; that the said plaintiffs last named since the execution of the

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Sheriff's deed to your orator, to wit: on the 29th day of October, 1863, caused a writ of *fi. fa.* to issue on said last judgment, and placed it in the Sheriff's hands for the avowed purpose of levying the same on and selling the identical property described in said Sheriff's deed, under the pretence that said judgment so obtained in your honorable Court, is prior in legal effect to the aforesaid judgment of your orator; whereas your orator charges that the same is subsequent, and that the only effect of such levy and sale will be to harrass and injure your orator, by casting clouds of doubts upon the title thus legally acquired by him, and by causing him to institute proceedings against the purchaser, whoever he may be, under the said *fi. fa.* now in said Sheriff's hands as aforesaid, with a view to the cancelation of his said purchase, and the removal of the cloud about to be cast over the title of your orator by the illegal acts and continuances of said Charles H. Myers and Alexius S. Myers in the premises, all of which proceedings your orator charges are oppressive and contrary to good conscience, wherefore inasmuch as your orator is remediless, at and by the strict rules of the common law, and to the end that the said Charles H. and Alexius J. Myers, and the Sheriff of Baltimore City, may be enjoined from proceeding further in the execution of said writ of *fieri facias* so issued from your honorable Court, and that your orator may be decreed to have a perfect and valid title to said property as against the pretended lien of the judgment so obtained by said Charles H. and Alexius J. Myers, and such other and further relief as to your honor may seem right and proper; may it please your honor to grant the State's writ of injunction, restricting and enjoining the said Charles H. and Alexius J. Myers, their aiders and abettors, and John J. Dannecker, the Sheriff of Baltimore city, from proceeding further in the execution of said

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writ of *fieri facias* issued at the suit of said C. H. & A. J. Myers, by levying the same on the property described in the deed of said Edward R. Sparks, Sheriff, as aforesaid to your orator, a copy of which is herewith filed, marked B ; and in case your honor should hold that the said defendants are entitled to priority by reason of their said execution and judgment, then your orator herewith tenders himself ready to pay into Court, and he does hereby tender himself ready under the order of your honor to pay to said defendants the full amount due to them.

The defendants answered, admitting the material facts stated in the bill, and the cause being heard on the bill and answer, the Court, MARTIN, J., on the 13th of January, 1864, delivered the following opinion :

In this case the application for an injunction is refused, and the bill dismissed, as the judgment obtained by the complainant by default, in the Court of Common Pleas, on the 15th of January, 1862, is to be treated as a mere interlocutory judgment, on the case of *Kierstead vs. Rogers & Garland*, 6 *H. & J.*, 282, and supported by approved writers on the practice of the Courts, (*Evans' Practice*, 335. *Bingham on Judgments*, 3,) and as such created no lien on the leasehold estate of the debtor, until it became a final judgment, by being extended by the Court on the 30th of October, 1862. *United States vs. Morrison*, 4 *Pet.*, 136. *Eschbach vs. Pitts*, 6 *Md. Rep.*, 71. *Clements & Barry*, 11 *How.*, 398.

The judgment therefore obtained by the complainant in the Court of Common Pleas on the 15th of January, 1862, and not extended until the 30th of October, 1862, must be considered as subordinate to the judgment regularly and fairly obtained by the defendants in the Superior Court, on the 9th of September, 1862, and I will sign a decree refusing the prayer for an injunction as asked for by the complainant, and dismissing the bill, with costs.

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This appeal is taken from the order passed in conformity with the foregoing opinion.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN, and WEISEL, J.

R. J. Brent for the appellant.

The point at issue is whether a judgment by default in an action of *assumpsit* imports a lien on a leasehold interest from the date of its entry or from the date of its extension. The appellant obtained in the Court of Common pleas, in January, 1862, the judgment by default against Wm. Rogers. The last count of the *nar* described correctly the promissory note constituting the cause of action. By our well settled practice the Court could have extended this judgment by a simple inspection of the note when filed to see if there were any credits. *Evans' Pr.*, 335. *Kierstead vs. Rogers et al.*, 6 *H. & J.*, 285.

The rules of Court, as shown in the agreement, require an affidavit to prove the note, but it is questionable whether such rules can alter the law, which decides that the note is proved by the judgment. 6 *H. & J.*, 285. But be that as it may, if the Court of Common Pleas extended this judgment on the note when filed without the required affidavit, its error cannot be collaterally shown. *Powles vs. Dilly*, 9 *Gill*, 222. *Ranoul vs. Griffie*, 3 *Md. Rep.*, 54. *Clark vs. Diggs*, 5 *Gill*, 109.

But the rule of Court is merely to provide for an *ex parte* extension of the judgment, and the affidavit is unnecessary when defendant's counsel agrees to the execution of the note and the extension of the judgment. The Court when it extended the complainant's judgment on the 30th of October, 1862, had before it not only the agreement of the parties that it might be so extended, but the note itself as declared on and established by the default.

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The fallacious idea of the appellee is that the agreement of October 30th, 1862, and the extension of the judgment thereon makes a judgment by confession, and that is the foundation of our title. Before such final or second judgment could be entered, the judgment by default should have been stricken out, as there cannot be two judgments. *Magruder vs. Darnall*, 6 *Gill*, 279. *Gainsford vs. Griffith*, 1 *Saund. R.*, 58, *and Roberts vs. Mariett*, 2 *Saund*, 187.

The form of a judgment by default, where the Court assess the damages, is given in 2 *Ev. Harris*, 346, 347. The true question is, to what date does our judgment, as extended, relate? We maintain that there is but one judgment, and that is the judgment by default, which establishes conclusively the right of the plaintiff to recover what shall be found to be due to him. *Green vs. Hamilton*, 16 *Md. Rep.*, 328, 329. *Mailhouse vs. Inloes*, 18 *Md. Rep.*, 333. 1 *Code*, 530, 62. 2 *Wilson*, 374 *and* 3 *Id.*, 61 *and* 62. *Gould vs. Hamersley*, 4 *Taunt.*, 748. *Jarett vs. State*, 6 *G. & J.*, 27.

If it be objected that the parties might extend the judgment collusively for too much to the prejudice of an intervening incumbrancer or judgment creditor, the answer is that a bill in equity would relieve against the fraud or other grievance complained of, as held in *Doub vs. Thomas*, 8 *Gill*, 1. It is true that the English books of practice speak of judgments interlocutory and final, as if they were separate judgments; but we submit that it is only to distinguish the same judgment in its incomplete phase and when perfected. At common law the true date of the lien created by an interlocutory judgment could not be material, as lands were only affected by *elegit*, &c., and chattels by the *fi. fa.* It is said that the lien on lands in Maryland is created by the right to levy *fi. fa. Eschbach vs. Pitts*, 6 *Md. Rep.*, 71. And there is no lien until the plaintiff can execute. But this

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is not so, as it would prevent the lien where the judgment is stayed by agreement or by law. *Anderson et al. vs. Tydings et al.*, 8 *Md. Rep.*, 443. The same lien on leasehold estates is conferred by the Act of 1861, ch. 70.

The defendant will also contend that there can be no lien until the amount of the judgment is ascertained and entered. If this be so, what did the Court of Appeals mean by declaring judgments to be final, so as to extinguish the original cause of action, although they say they are not absolute or capable of being executed by *sci. fa.* or *fi. fa.* until the amount is ascertained. If they are final judgments, as repeatedly held, before the amount is ascertained, why is not an interlocutory judgment equally final before the amount is extended? *See Turner vs. Plowden*, 5 *G. & J.*, 52. *State vs. Jones*, 2 *Gill*, 49. *Clark vs. Diggs*, 5 *Gill*, 110. *Young vs. Reynolds*, 4 *Md. Rep.*, 388. *Ing vs. State*, 8 *Md. Rep.*, 287.

The lien takes effect from the date of the interlocutory judgment, which *pro hac vice* is final, though it is not final for an execution until it becomes absolute by the amount being ascertained of record. 15 *Texas*, 32. 11 *How.*, 409. It is true that in the last case Chief Justice TANEY dissented, but gave no opinion, and the dissenting opinion of Judge CATRON shows that he regarded the interlocutory judgment as a mere office judgment by the Tennessee practice. But our Code regards all interlocutory judgments as final by declaring that interest must be computed from their date. 1 Code, 15.

In conclusion, if as decided in 18 *Md. Rep.*, 323, and 16 *Md. Rep.*, 328, Dr. Davidson had his right to recover established by the default, then the defendant, Myers, could not impair that right by taking a confession of judgment subsequently from Rogers, the defendant, in the prior judgment by default, because if Rogers could thus

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confess away all his property it would defeat practically the rights of Dr. Davidson as vested previously. *Martin vs. Martin*, 7 *Md. Rep.*, 368.

The fact that the judgment by default was not a final judgment when entered, but becomes so subsequently, does not prevent the lien from relating back to the date of the entry of the judgment, in the same manner that the right to interest relates back to the day of default. A judgment of condemnation *nisi* in attachment is not absolute until the lapse of the term, yet when the term passes it becomes absolute from its date and not from the end of the term. *Walters et al. vs. Munroe*, 17 *Md. Rep.*, 505. *Graff et al. vs. Merchants and Miners*, 18 *Md. Rep.*, 370.

Our bill is therefore properly filed to prevent a clear legal title, as vested under a prior judgment, from being obscured by the cloud which the defendant insists on casting over that legal title. As a bill would lie to cancel the title which the defendant might give to the purchaser under his junior judgment, so will this lie to prevent such an injustice effecting the integrity and value of our title. *Taylor vs. McCann*, 10 *Md. Rep.*, 418.

Lastly, it is clear than in an action upon such a judgment the cause of action would be considered as running from the date of the judgment by default, in the case of *limitations* being pleaded to an action of *debt* or *scire facias* on the judgment as extended.

"The Act of 1861, ch. 70, enacts, that judgments shall be liens on leasehold interest to the amount and from the date thereof to the same extent and effect as liens are now created by judgment upon real estate." Under this Act the first question is, what is the date of the judgment obtained by the appellant?

If there be but one judgment, and that is the interlo-

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cutory one, made final when the amount is ascertained, then its true date is the day of the judgment by default.

In the preceding pages we have shown that by the Code the judgment is to bear interest from the day of default, and this is a legislative interpretation to fix the date of the judgment when perfected.

The second question relates to the amount, but the cases cited on our brief hereinbefore, conclusively establish that the amount must be ascertained to make the judgment effectual, but it is not the less a judgment before the amount is ascertained.

In conclusion, we assume under the express decisions of this Court, that our judgment by default established our right to recover something, and whatever might be the rights of the appellees if they were judgment creditors in an adversary proceeding, yet in this case they stand on the record as mere volunteers holding a judgment by confession alone. If such a judgment can overreach our elder judgment by default, then it is in the power of every debtor while under default upon the record to nullify the right of the creditor as conclusively established by that default, for it is of no avail to say the creditor has a paramount right to something, if the debtor can, by his own voluntary confession, appropriate his whole real estate to a preferred creditor by a confession of judgment, and thus defeat the elder title.

B. F. Horwitz, for the appellees, argued:

1st. That the judgment by default obtained by Davidson on the 15th January, 1862, was an interlocutory judgment. Judgments by default are either interlocutory or final. When the action sounds in damages, as in *assumpsit*, *covenant*, *trover*, *trespass*, the judgment is only interlocutory—that the plaintiff ought to recover his damages—leaving the amount to be afterwards ascertained; and the

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judgment for the plaintiff in these actions is also interlocutory on demurrer. In *debt* the judgment is commonly final, though a writ of inquiry is sometimes required. 1 *Tidd's Practice*, 568. *Bingham on Judgments*, 3. And as to the mode of ascertaining the damages after an interlocutory judgment, see 1 *Tidd*, 570. The law in Maryland is the same. *Evans' Practice*, 335. And in *Turner vs. Plowden*, 5 *G. & J.*, 52, the Court lays down the rule that where there is nothing to be done by the Court, the judgment is final; but wherever there is an act to be done by the Court, then merely interlocutory. The elementary works above referred to, as well as the case of *Kierstead vs. Rogers*, 2 *H. & J.*, 282. *Clammer vs. State, &c.*, 9 *Gill*, 279, and the 12th rule of Court, show this judgment was but interlocutory until extended or made final by the Court.

2nd. An interlocutory judgment is not a lien on real estate. What makes a judgment a lien on real estate? It was not so at common law, because, under that system, based on the feudal system, the real estate of the defendant in a judgment could not be seized and sold under an execution issued on the judgment. The feudatory could not voluntarily alienate his land, and, *a fortiori*, the creditor could not involuntarily deprive him of it. But by statute, 13 *Edward I, ch.* 18, passed in the year 1285, and commonly called the Statute of Elegit, the right to seize and hold the real estate of the judgment debtor was given, and from that time the judgment became a lien. It is, therefore, alone the right to seize and sell the real estate under the judgment which creates the lien—a lien which is not the result of statutory provision and which is not incidental to, but flows from, the judgment. It is a matter of construction; it is the creature of the Court, and follows as a consequence of the Court's action. By statute of 5 *George*

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II, ch. 7, relating to the Colonies of Great Britain, and which has ever since been the law of Maryland, the same right to take in execution and sell the real estate of the debtor as his personal estate was given. The statute of 29 *Charles I, ch.* 3, *sec.* 16, however, exempts personal property from the lien until an execution is actually placed in the Sheriff's hands, which was the law of Maryland until the passage of the Act of 1861, ch. 70, distinguishing between chattels real and chattels personal. *Coombs vs. Jordan*, 3 *Bland*, 284, 297. *Jones vs. Jones*, 1 *Bland*, 443. *Eschbach vs. Pitts*, 6 *Md. Rep.*, 71. *United States vs. Morrison*, 4 *Peters*, 124. *Miller vs. Allison*, 8 *G. & J.*, 35. 1 *Powell on Mortgages*, 273, *note o.* It then follows that there can be no lien until there is a right to issue an execution and consequently a judgment which will support an execution under which the land can be sold. *Scriba vs. Deanes*, 1 *Brockenbrough*, 170. *Bank of U. S. vs. Winston's Exc'rs.*, 2 *Brockenbrough*, 252. An interlocutory judgment of course will not. It settles nothing but the jurisdiction of the Court, and that the plaintiff ought to recover something, but the amount is unsettled. It does not even merge the cause of action. *Turner vs. Plowden*, 5 *G. & J.*, 52. A final judgment determines that he do recover and what he recovers. An interlocutory judgment is but an intermediate step between the beginning and the end of the suit, like an interlocutory decree in chancery; the end is the final judgment. In fact, after the interlocutory judgment, the whole case remains to be determined, *non constat* but that the plaintiff may only recover one cent on the final judgment. There may be a regular trial, instructions asked from and given by the Court, exceptions to the Court's ruling, motions, an appeal, &c. Is it not preposterous to say that it is a lien, when even a verdict of a jury is not a lien in a case where there

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is an issue and trial by jury? It might as well be contended that the filing of a declaration constituted a lien. Again, a lien must be for something, some fixed amount. The very term implies it. How can this be in the case of an interlocutory judgment where the cause of action is not even merged? *Evans' Practice*, 335–337. *Bingham on Judgments*, 13 *Law Lib.*, 1, 2. *Patrick vs. Ridgaway*, 4 *H. & J.*, 312. *Wilmer vs. Harris*, 5 *H. & J.*, 1. *Green vs. Hamilton*, 16 *Md. Rep.*, 317. *Mailhouse vs. Inloes*, 18 *Md. Rep.*, 328. *Acts of* 1864, *ch.* 175. *Murphy vs. Cord*, 12 *G. & J.*, 182.

A stay of execution does not destroy the lien. The execution is but the enforcement of the lien which springs from the judgment. The right to sell remains; it is only put off or suspended. *Anderson vs. Tydings*, 8 *Md. Rep.*, 443. The lien dates in Maryland only from the day of the rendition of the judgment. That is the final, absolute judgment. *Taylor vs. Thomson*, 5 *Peters*, 358. *Miller vs. Allison*, 8 *G. & J.*, 35. *Jones vs. Jones*, 1 *Bland*, 443. *Davidson vs. Clayland*, 1 *H. & J.*, 546. *Hanson vs. Barnes*, 3 *G. & J.*, 359. *Hampson vs. Edelin*, 2 *H. & J.*, 64. See also, 1 *Powell on Mortgages*, 275*c*, 279*a*. *Murfee's Heirs vs. Carmack*, 4 *Yerger*, 270. *Clements vs. Berry*, 11 *How.*, 398.

3d. The very language of the Act of 1861, ch. 70, (under which the lien in this case is claimed,) shows that no other than a final judgment can be a lien under it.

4th. As to the position of the appellant that the judgment of the Messrs. Myers was by confession, and therefore could not defeat Davidson's prior lien. This position assumes that Davidson had a prior lien, the very question to be determined; but besides, it was a judgment regularly and fairly entered at the second term, and such a

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judgment as Rogers' attorney was obliged to enter under the 25th Rule of the Superior Court, which is in the following words, to-wit:

"25th. On the second day of the term, the trial docket will be called for the purpose of entering judgments by confession, or default, rules and other entries necessary to bring the causes to issue. The Court will expect judgment to be entered in all cases where the demand is for a sum certain and evidenced by writing under hand; or by an account verified by affidavit, unless there is a defence to the action upon which the defendant intends to rely. And where the trial of an action is stayed by injunction, or other cause for continuance exists, on which the party intends to rely, the motion is properly to be made at this time."

The cause of action was a promissory note. It was not, therefore, such a confession of judgment as was contemplated by the case of *Martin vs. Martin*, 7 *Md. Rep.*, 368, relied on by the other side. It was a judgment which Rogers' attorney was obliged to confess, and not one voluntarily confessed with a view to prejudice Davidson or any one else, which, if it were so, would have to be proved and could not be presumed. It is therefore submitted that the appellees acquired on the 9th September, 1862, an absolute judgment, and therefore a lien on the property of said Rogers, which was at that time covered by no lien in Davidson's case.

WEISEL, J., dissented, and delivered the following opinion:

I am constrained to differ from my brother Judges in their view of the character of the judgment in this case.

It is true there was a judgment by default entered for want of plea, but it was entered without leave to take out

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a writ of inquiry; nor was an inquisition necessary. The plaintiff, besides the common money counts, counted upon a promissory note. The personal appearance of the defendant was entered by order of the Court, under the Act of Assembly, and he being under rule plea, judgment on *nil dicit* went against him for the damages laid in the declaration. Afterwards, and at a subsequent term, the promissory note was filed and directions given by the attorneys of both parties (the defendant then appearing by attorney) to extend the judgment for the amount of the note and interest to the 24th day of October, 1862, with interest from that time and costs. The clerk in extending the judgment, under the orders of the attorneys, made a special memorandum in these words:

"The extension of the judgment in this case is made in accordance with the foregoing order and agreement of counsel.

"*Memorandum:* Judgment was rendered in this case by default of plea, on the 15th day of January, in the year 1862, for the claim laid in the declaration and costs, and extended on the 30th day of October, 1862, for $277.50, with interest from the 24th of October, 1862, and costs."

"The judgment by default is an admission of the cause of action, and the defendant's liability to the amount of the note, which must be produced on the trial, that it may be seen whether any part of it has been paid, but which need not be proved." EARLE, J., in *Kierstead vs. Rogers*, 6 *H. & J.*, 285. And where a judgment by default is regularly entered, "it is as binding as any other, as far as it respects the power and jurisdiction of the Court, in declaring that the plaintiff is entitled to recover, though the amount of the recovery, in some cases, remains to be ascertained by the jury." *Green vs. Hamilton*, 16 *Md. Rep.*, 329. "A judgment by default is interlocutory or

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final. When the action sounds in damages, as *covenant*, *trover*, *trespass*, &c., it is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. 1 *Tidd's Pr.*, 568. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final;" &c. *Clements vs. Berry*, 11 *Howard's Sup. C. U. S.*, 409, 410.

It was not necessary in this case that a jury should have been impanelled to ascertain the amount due. A judgment by default had been entered, and the extension afterwards, agreeably to the direction of counsel, was what the clerk himself could have done upon the examination of the note and any credits upon it. This was formal, and added nothing (in the language of Justice MACLEAN in the case last cited,) to the legal effect of the judgment by default. What follows in that opinion is strictly applicable to this case: "The defendant failed to plead [by the rule day] and a judgment by default consequently followed. The action being debt, founded upon notes of hand, which were admitted to be genuine by the default, the Court saw that no inquiry was necessary, and the judgment was therefore directed to be entered. That judgment was final according to the forms of entering judgments at the common law. The omission by the clerk to make the calculation of the amount of the judgment, and enter it in form on the 8th of March, was supplied by the entry on the 10th. Such entry, therefore, we think, may be considered as having relation to the first judgment." 11 *How.*, 410.

The judgment entered in this case, in my judgment, was final and not interlocutory in its character. Such judgments by the Code are to be entered to carry interest from the time they were rendered. "All judgments by con-

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fession, on verdict, or by default, shall be so entered as to carry interest from the time they were rendered." 1 Code, Art. 29, sec. 15. This is conclusive to my mind that they are to be judgments on that day, and therefore liens on real estate from that time.

Had the note been filed in this case on or before the day the judgment by default was entered, no doubt would have arisen as to the lien of the judgment from that date. The note happened then not to be on file, and the judgment was not extended or entered for its precise amount. This was done afterwards, and although it was so extended as not to bear interest from the day of the default, but from a day subsequent, yet I do not think that this irregularity or deviation from the requirement of the Code should have the effect of postponing the lien of the judgment. A judgment having been entered for the damages in the declaration, the extension of it afterwards for the amount really due, would operate as a release of the damages upon the payment of the sum so ascertained, with the interest and costs.

There is a class of cases in Maryland in which the amount recovered in a judgment remains to be ascertained, and yet the lien attaches from the date of its entry; as where a judgment is entered by confession for such sum as some person named or agreed upon shall say is due. Such judgment is final, and yet no execution can be sued out upon it until the sum shall have been ascertained. There is no difference between such and judgments by default, where no inquisition is necessary. The right to the execution exists in both cases, but its exercise is suspended until the judgment becomes effective. But the lien of the judgment has in both cases attached. I regard them essentially the same in this respect.

In cases of default, requiring an inquisition, it is not

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clear to my mind, (nor does this case call for the examination,) whether the doctrine of relation applies.

COCHRAN, J., delivered the opinion of this Court.

The appellant rests his claim to relief on a judgment by default, obtained in January, 1862, and upon which, as appears from the record, a final judgment by confession was entered in the month of October following. The Act of 1861, ch. 70, declares that judgments shall be liens, "*for their amount and from their date,*" on leasehold interests, in the same manner as upon real estate; and the appellant's proposition is, that the judgment by default, relied on here, operated as a lien on the leasehold property of the debtor from the time of its rendition.

The character of such a judgment is well defined in our practice. "Judgments by default, on demurrer, and *non obstante veredicto*, are interlocutory; and final judgment cannot be given until the damages to be recovered are assessed." *Bingham on Judgments*, 3. *Evans' Prac.*, 335. Generally, a defendant on whose default a judgment by default is entered, confesses the cause of action, and the judgment so entered is conclusive in respect to the jurisdiction of the Court and the right of recovery; but it goes no farther, for the amount remains to be ascertained, and the recovery thereof to be finally adjudged to the plaintiff. *Kierstead vs. Rogers*, 6 *H. & J.*, 282. *Green vs. Hamilton*, 16 *Md. Rep.*, 317. *Heffner vs. Lynch*, 21 *Md. Rep.*

The mode of ascertaining the amount for which the final judgment can go, in all cases of interlocutory judgments whereby the right of the plaintiff is established, and the damages cannot be ascertained without the intervention of a jury, is prescribed in the Code, Art. 75, sec. 62. In this class of cases, the final judgment is entered upon the inquisition of the jury; but where the parties fix the amount by agreement, and in that manner waive the inquisition,

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or the cause of action is such that the Court may ascertain the amount without an inquisition, then the final judgment may be entered.

The judgment in question here, was clearly interlocutory; and the record of the case in which it was obtained shows that another and final judgment was entered on the 30th of October following. It was agreed by the parties on the 29th of October, that the judgment should be entered for $277,50, with interest from the 24th of October, 1862, and costs, and it was thereupon adjudged that the appellant should recover from the defendant the amount thus ascertained. This judgment could not, in the nature of things, relate back and take effect as of the date of the judgment by default; nor could the judgment by default, in establishing the jurisdiction of the Court and the simple fact of the plaintiffs' right to recover, be said or understood to constitute a recovery. Strictly speaking, there was no recovery until it was adjudged by the Court on the 30th of October; and the only privilege secured to the appellant by the judgment by default, was that of proceeding by inquisition or otherwise, to assess the damages and obtain a final judgment, without delay to the defendant.

Treating the judgment by default as interlocutory, merely, it could not operate as a lien on the real or leasehold property of the defendant. The reason why a judgment constitutes a lien on the property of the debtor, as stated in *Combs vs. Jordan*, 3 *Bland*, 284, and in *Eschbach vs. Pitts*, 6 *Md. Rep.*, 71, is that it clothes the judgment creditor with the right to make his debt out of the land of the judgment debtor; this right, on the one side, and consequent liability of the debtor's property on the other, constituting the lien. And it surely cannot be maintained that a creditor is clothed with any such right by an interlocutory judgment, where the amount to be recovered remains to be ascertained, and the recovery of it

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to be adjudged by the Court. The cases of *Clements vs. Barry*, 11 *How.*, 398. *United States vs. Morrison*, 4 *Peters*, 136, and *Eschbach vs. Pitts*, are conclusive on this point. But further, the Act of 1861 declares in specific terms, that judgments shall be liens *for their amount* and *from their date*, and as we construe this provision, final judgments alone were contemplated. The decree of the Court below must be affirmed, with costs to the appellee.

Decree affirmed.

(Decided May 2nd, 1866.)

CHARLES D. HISS *vs.* STATE OF MARYLAND.

INDICTMENT AT COMMON LAW OF JUSTICE OF THE PEACE FOR MALFEASANCE IN OFFICE: MISDEMEANOR: MOTION IN ARREST OF JUDGMENT.—A Justice of the Peace having discharged a prisoner brought before him, charged with the larceny of certain bank notes and promissory notes, and having refused to deliver the same, which he had taken from the prisoner when on examination, to one W. D., to whom the latter had assigned them, an indictment was found against him, charging that he, being then and there a Justice of the Peace, unlawfully, wilfully, oppressively, corruptly, and in violation and contempt of his duty as Justice of the Peace, neglected and refused to deliver the said bank notes and promissory notes to the said W. D., being then and there requested so to do, well knowing the said W. D. was entitled to receive the same, &c. The traverser having pleaded *not guilty*, after trial and verdict of *guilty*, moved an arrest of judgment, which being overruled he sued out a writ of error, HELD:

1st. That the plaintiff in error having been tried and found guilty of the facts as charged, whether by a jury or by the Court, upon submission those facts must be assumed to be true.

2nd. That the facts charged constitute an offense amounting to a misdemeanor, for which the plaintiff in error was indictable and punishable at common law.

WRIT OF ERROR to the Circuit Court for Baltimore County.

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Hiss *vs.* The State.

This was a *writ of error* to the Circuit Court for Baltimore county, in the case of the indictment of one Charles D. Hiss, a Justice of the Peace for malfeasance in office, removed from the Criminal Court of Baltimore City. The facts are stated in the opinion of this Court.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WHISEL, J.

John H. Ing for the plaintiff in error.

The indictment charges that "after the release of the negro, Silas Wright, it then and there became and was the duty of the said Hiss, as Justice, to deliver the money to the person legally entitled to demand and receive the same.

The State thus, by its own averment, concedes that the discretion by judgment of the Justice, was to be exercised in determining "the person legally entitled to demand," &c.

For error of judgment in deciding that Mr. Daniel was not entitled, and as a consequence of such error of judgment in neglecting and refusing to pay Mr. Daniel, the appellant is arraigned criminally. Does this constitute a criminal offense? Can the indictment be sustained?

In *Martin vs. Mott*, 12 *Wheaton*, *p.* 31, the Supreme Court of the United States say: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of these facts.

It was the plain duty of the Justice to retain the money for the master, or to await proof of the negro's freedom. No man is liable to an action for what he doth as judge. 2 *Hawk Pl. of the Crown*, 85, *sec.* 20.

Under the 4th Art., 1st sec. of Constitution of 1851, judicial power was vested in Justices. For an error in

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judgment a Justice is not punishable. *Burr*, 556, 785, 1162.

Upon the facts set forth in the indictment, a civil action was the remedy of Mr. Daniel, not an indictment. In *Deal vs. Harris*, 8 *Md. Rep.*, 40, the Court of Appeals say in substance: "The Judge is to be held harmless for a wrong judgment, provided the error results from an erroneous conclusion at which he arrives.

Negro Peter vs. State, 4 *H. & Mc H.*, 3, is an authority to show that on a writ of error the judgment of an inferior Court may be reversed in a criminal case.

That a writ of error is a remedial writ, and may be used in every case, *ex merito justitiæ*, see *Show.*, 13, 260. *I Lev.*, 149, 189. *Hob.*, 116. *Vent.*, 30, 34, 353, 42, 203. 1 *Leon*, 325. *Salkeld*, *Walcott's case*, *Co. Litt.*, 260 *a*.

A. Randall, Attorney General for the State.

The State, the appellee, contends that the Court below was correct in overruling the motion in arrest of judgment.

1st. Because the jury by their verdict having found that the traverser by virtue of his office, took these bank notes and promissory notes from Silas Wright, a prisoner charged with stealing them, whom he afterwards released from that charge, and that the notes should have been returned to the prisoner's assignee, William Daniel, who demanded the same, and who was known to the traverser to be the assignee thereof; and that the traverser unlawfully, wilfully, oppressively, corruptly, and in violation and contempt of his duty in that behalf as Justice of the Peace, neglected and refused to deliver the same, &c., did thereby convict the traverser of the charge set forth in the indictment.

This finding of the jury excludes the idea of the negro's being a slave or unable to make the assignment of the

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notes, and indeed all other of the defences set up in this Court by the traverser inconsistent with this verdict.

It was a matter of no consequence whether or not there was any obligation on the part of the traverser officially to receive these notes from the prisoner, as he did in fact receive them by virtue of his office. Having thus received them, and afterwards released the prisoner from the charge of stealing them, it was the duty of the traverser, as Justice of the Peace, to restore them to the prisoner's assignee, known to him as such, which itself excludes the idea of any other ownership.

It was no business of the Justice of the Peace to set up pretended claims for imaginary owners, in violation of his plain official duty to the assignee whom he knew, as the verdict shows, to be the real owner of the notes.

This is not a case of any error of judgment or discretion of a Justice of the Peace in the discharge of his official duty, for his duty officially had terminated when he discharged the negro prisoner, and as an incident these notes should then have been delivered to the assignee, but the traverser having, as the jury find, wilfully, corruptly, unlawfully, oppressively, and in violation of and contempt of duty, refused so to do, excludes any such notion as error of judgment or of discretion.

2nd. The facts being thus clearly found, and the wilful, corrupt and oppressive conduct of the Justice of the Peace being clearly proved, and his prostitution of his office to a corrupt purpose, he is subject to punishment, either by information or indictment, as will be seen by the following authorities, viz: 5 *Bacon's Abr.*, 426, (*edition in the Library, title, Justices of the Peace, letter F, secs.* 1 *and* 2, *p.* 429. 4 *Burn's Justice of the Peace, pages* 30 *and* 31. 2 *Hawkins*, 85. *Rex vs. Seton*, 7 *T. R.*, 374. *Rex vs. Barron*, 3 *Barn. & Ald.*, 432.

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Bowie, C. J., delivered the opinion of this Court.

An indictment was found against the plaintiff in error, charging that on the 1st of June, 1863, at the City of Baltimore, Silas Wright, a negro, was arrested and brought before the plaintiff in error, who was then and there a Justice of the Peace of said city, accused of stealing certain bank notes and promissory notes, and upon a hearing by the Justice was discharged; that at the time of the arrest, Wright was searched and certain bank notes taken from him and delivered to the plaintiff in error, who was in duty bound to deliver the same to the person legally entitled to demand and receive the same; that William Daniel afterwards became and was legally entitled to receive the same, and the plaintiff in error, then and there, unlawfully, wilfully, oppressively, corruptly, and in violation and contempt of his duty in that behalf as Justice of the Peace, did neglect and refuse to deliver the bank notes, etc., to the said Daniel, being then and there requested so to do, well knowing the said Daniel was so entitled, etc. Upon which indictment, the plaintiff in error being arraigned, pleaded *not guilty*, and put himself upon his country, and being found *guilty*, moved in arrest of judgment, which being overruled, the traverser sued out his writ of error.

The points relied on by the plaintiff in error, are:

1st. That a Justice of the Peace is not liable to indictment for error of judgment in the discharge of his official duties.

2nd. That the indictment did not charge any offence for which the traverser was criminally liable.

3rd. That he was under no legal official obligation to receive or pay over the money.

It is one of the most ancient, fundamental and cherished maxims of the common law, that a Judge should not be

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liable civilly or criminally, for error in judgment in the discharge of his office.

"This freedom from action and question at the suit of an individual (it has been observed) is given by the law to the Judges, not so much for their own sake as for the sake of the public and the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be." * * * But the law distinguishes between error of judgment and corruption, or wilful neglect of duty. For these there is, and always will be, some due course of punishment by public prosecution. *Brooms' Legal Maxs., p.* 41, *L. L., vol.* 50. *Garnett vs. Ferrand,* 6 *B. & C.,* 625, 626. *Vaugh, R.,* 383.

Another venerable authority declares, "Justices of the Peace are not punishable civilly for acts done by them in their judicial capacity, but if they abuse the authority with which they are entrusted, they may be punished criminally at the suit of the King by way of information. But in cases where they proceed ministerially rather than *judicially,* if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the King. *Hale's Pleas of the Crown,* 2 *vol.,* 57.

Lord MANSFIELD, in a case in Burrows, said, "If it clearly appears that the Justices have been partially, maliciously or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information; or even, possibly by action, if the malice be very gross and injurious. 3 *Burns' Justice,* 31. *See also,* 2 *Bay,* 385. 4 *Bibb,* 28. 15 *Wend,* 277. 6 *Cowen,* 661. *Cited,* 5. *Bacon Abr., title, Justices of the Peace, Letter J, p.* 429.

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These principles are plainly recognized in *Brevard vs. Hoffman*, 18 *Md. Rep.*, 484, which was an action against Judges of Election, for refusing the plaintiff's vote; the defence was, that the Judges acted in a judicial capacity, and were not liable. Referring to which, this Court thus defined the law: "When the act in question is that of a judicial officer, all the law can secure is a guarantee that they shall not with impunity do wrong, *wilfully*, fraudulently or corruptly. If they do so act, they are liable, both civilly and criminally; but for an error of judgment they are not liable either civilly or criminally."

All the elements of crime are enumerated in the indictment, the wilful, unlawful, corrupt violation and contempt of duty, as a Justice of the Peace, in neglecting and refusing to deliver the bank notes to the said Daniel, being then and there requested so to do, *knowing him to be entitled to the same.* It is immaterial whether the law imposed upon him the duty to receive the property, (of which we express no opinion,) it was received by him, under color of his office, if not "*virtute officio*," and there can be no doubt of his legal obligation to restore it to the person entitled.

The plaintiff in error having been tried and found guilty of the facts as charged, whether by a jury or the Court, upon submission, those facts must be assumed to be true. They constitute in our judgment an offence amounting to a misdemeanor, for which the plaintiff in error was indictable and punishable at Common Law. Finding no error in the judgment below, it must be affirmed.

Judgment Affirmed.

(Decided May 11th, 1866.)

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WILLIAM TAGGART *vs.* THE WESTERN MARYLAND RAIL ROAD COMPANY.

CORPORATIONS, SUBSCRIPTIONS TO STOCK OF, PRIOR AND SUBSEQUENT TO ORGANIZATION: PRESUMPTIONS: WAIVER: PRINCIPAL AND AGENT: ACTIONS BY AND AGAINST CORPORATIONS.—A Rail Road Company was incorporated by Act of Assembly, with a clause prescribing certain preliminaries to be observed in opening the books and taking subscriptions for stock; among others, that "upon every such subscription there shall be paid at the time of subscribing, to the said Commissioners, or to their agents appointed to receive such subscription, the sum of one dollar on every share subscribed." Books were opened by the Commissioners, the requisite number of shares subscribed, a Board of Directors and President were elected, and the Company fully organized. After this organization the defendant subscribed for ten shares, in one of the subscription books, upon the terms and conditions prescribed therein and in the charter, with this condition annexed: "Provided the said contemplated road should be built on the then present track of the existing branch to "Green Spring" of the B. & S. R. R.," but did not pay the sum of one dollar per share required by the charter to be paid to the Commissioners at the time of subscribing. In an action brought by the Company to recover the amount of the calls on the defendant's subscriptions to the stock, HELD:

1st. That the preponderance of authority in favor of a strict compliance with the provisions of the charter, in cases of subscription *prior to the organization of the Company*, is such as is not to be disregarded.

2nd. There is no doubt that, in general, a strict compliance must be shown with the provisions of the charter, but in some cases a compliance will be presumed and in others it may be waived.

3d. The distinction between subscriptions prior and subsequent to organization is clearly recognized in this State.

4th. In this case, the corporation being organized by the subscription of the necessary proportion of the stock and election of officers, succeeded to the powers previously vested in the Commissioners, to sell and dispose of the remaining shares, without regard to the conditions imposed on them.

5th. The act of the agent taking the subscription being recognized by the corporation, by receiving and registering the subscription among the conditional subscriptions, was equivalent to a previous appointment of the agent for that purpose.

6th. A conditional subscription to stock is a continuing offer, which is final and absolute when accepted.

7th. All contracts for stock made *subsequent* to the formation of the Company,

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in consideration of a particular location, when complied with by the Company, will be as binding on both parties as if the contract had been absolute and unconditional.

8th. Non-compliance with the provisions of a charter is not a matter of defence, collaterally, between corporations and their stockholders or debtors.

9th. The modifications of a charter, in enlarging the time of commencing and completing the work, is one of those incidents to all charters which comes within the constitutional power of the State to exercise, and with due notice of which all its citizens must be presumed to contract.

STATUTE OF LIMITATIONS.—Subscriptions to the stock of a rail road company were made on the 28th of April, 1853, conditional upon the adoption by the company of a particular route. This route was adopted by the company on the 31st of March, 1857. No calls were made for the payment of subscriptions until the 25th of June following. In an action by the company to recover the amount of the calls upon the stock subscribed for, HELD:

That the statute of limitations did not begin to run until the several calls were due.

APPEAL from the Superior Court of Baltimore City.

This action was instituted on the 1st day of February, 1861, by the appellee, to recover from the appellant the amount of his subscription to its stock.

By the Act of 1852, ch. 304, certain persons therein named were appointed commissioners to receive subscriptions to the capital stock of "The Baltimore, Carroll and Frederick Rail Road Company."

The capital was fixed at five hundred thousand dollars, in shares of fifty dollars each; and it was provided that as soon as one thousand shares should be subscribed, the company should be incorporated. It was enacted by the third section, that upon every subscription there should be paid, at the time of subscribing, to the commissioners, or their agents, appointed to receive subscriptions, the sum of one dollar on every share subscribed, and that the residue thereof should be paid in such instalments, and at

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such times as might be required by the President and Directors of said company, or a majority of them.

By a supplement, 1853, ch. 37, the title of the company was changed to its present name. At the same session, [1853, ch. 363,] authority was given to extend the said road to Hagerstown. By the Act of 1856, ch. 289, the State expressly waives all causes of forfeiture, by reason of the company's failure to comply with any of the provisions of the Act of incorporation, and allows the period of six years for the commencement, and twelve years for the completion of said road, from the passage of said Act, that is from the 10th of March, 1856. The Acts of 1858, ch. 405 and 420, and 1860, ch. 20, contain no provision material to any of the questions in this case. They were offered in evidence to show the recognition, by the State, of the appellee, from time to time, as a validly existing corporation.

The appellant made his subscription on the 28th of April, 1853. A condition was annexed to the subscription of the appellant and some other subscribers as follows: "Provided the contemplated road shall be built on the present track of the existing branch to 'Green Spring' of the Baltimore and Susquehanna Rail Road."

The plaintiff offered in evidence a small book, containing the following heading and subscription thereto, viz:

"Baltimore, Carroll and Frederick Rail Road company, capital stock 10,000 shares, at $———, per share.

"We whose names are hereunto subscribed, do promise to pay to the President and Directors of the Baltimore, Carroll and Frederick Rail Road company, the sum of fifty dollars for every share of stock set opposite our respective names, in such manner and proportions, and at such times as shall be determined by the President and

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Directors of said company, or a majority of them, in pursuance of an Act of the General Assembly of Maryland, entitled an Act to incorporate the Baltimore, Carroll and Frederick Rail Road company. Witness our hands this 28th day of April, in the year of our Lord one thousand eight hundred and fifty-three."

And it was admitted by the defendant, that the name of the defendant thereto subscribed, was in his hand writing, and it was also admitted by the plaintiff that the defendant had not, at the time of subscribing or afterwards, paid one dollar for each share so subscribed by him.

The plaintiff further offered in evidence, that the commissioners appointed by the charter, to receive subscriptions to the stock of the plaintiff, after notice duly given as required by the original Acts, opened books, pursuant to such notice, and in conformity with the requirements of said Act, and having received subscriptions for more than 1000 shares, notified the subscribers, in due form, to meet in Westminster, on the 14th of February, 1853. The plaintiff also proved that the subscribers to said stock, did accordingly meet, at the time and place designated, when the commissioners reported that they had received *bona fide* subscriptions for 1086 shares of stock, and the subscribers thereupon proceeded to organize the company, by the election of President and Directors.

It was further offered in evidence by the plaintiff, that the Act of Assembly of 1853, ch. 37, was duly accepted by the plaintiff, but was not so accepted until after the defendant's subscription had been made, and also, that at meetings of the board, and of the stockholders, held on the —— day of ———, reports were made of the persons who had previously to that date subscribed for stock; some were ordinary subscriptions, and the whole number of these (including what had been received by commissioners, before organization) did not exceed 1500 shares, others of

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the subscriptions were conditional and these were less than 600 shares.

The subscription of the defendant was taken and received by Wm. Fell Johnson, at Rockland, in Baltimore county, without any public notice having been given, of the time and place of receiving such subscriptions, and no proof was offered of any authority from the company to said Johnson to receive subscriptions ; but it was proved, that J. Henry Huppe who was a director of said company, was authorized to receive additional subscriptions to the capital stock of said company, in Carroll county, and that said Huppe placed books with the proper headings in the hands of several persons, and as one of said persons in the hands of Mr. Green to receive subscriptions in Baltimore county, by whom one of the said books was placed in the hands of the said Wm. Fell Johnson, who received several subscriptions for stock, besides the defendant's subscription, and the said subscription books were shortly afterwards and before the month of November, 1853, returned to and were, and have thenceforth continued in the possession of the said company, and the name of the defendant and the names of said other subscribers, were reported by said Huppe to said company, and were placed on the list of subscribers to its stock on the books of the said company, and there never was any action by said company refusing to recognize them as subscribers to said stock, so far as the said subscriptions were mentioned, and as conditional subscriptions, so far as the same were conditional.

The plaintiff also offered in evidence a paper, and proved that the same was made, as a report by the President of the plaintiff, to the stockholders of said company, on the 16th day of November, 1853, and that the same on that day was accepted and adopted by the said stockholders ; and further proved, that the subscrip-

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tion of the defendant was by the said stockholders, and by the President and Directors of said company, considered and counted as a conditional subscription for stock, according to the terms and purport of said subscription of the said defendant; that the said defendant did not, at any time, give notice to the plaintiff, or to any of its officers or agents, that he had withdrawn, or meant to withdraw or repudiate his said subscription; that the plaintiff, the company, although the commencement of the construction was unavoidably delayed, never did, by any act, express any intention to abandon the making of said road.

It was also offered in evidence that the "Green Spring" branch of the Baltimore and Susquehanna Rail Road was adopted by the plaintiff, for the route of its road, on the 31st of March, 1857, and that the road was put under contract, on that day, for its construction on that route. It was admitted that no work was done until the summer or fall of 1857. And it was also admitted that the road was actually built on the track of the branch to "Green Spring," on the Baltimore and Susquehanna Rail Road, as the same existed on the 28th of April, 1853.

It was conceded by the plaintiff, that (except a mere reconnoissance of the route) nothing was done in the execution of the work, until the summer of 1857. It was also proved that no calls were made for payment of subscriptions until the 25th of June, 1857, when the first call was made, payable at the time mentioned in the declaration, others were made from time to time afterwards, as stated in the declaration, and due and proper notice was given of the several calls so made.

Evidence was offered on the part of the defendant that he had never been present at any meeting of the stockholders of the plaintiff, or of the subscribers to its stock.

The plaintiff then offered the three following prayers:

The plaintiff, by its counsel, prays the Court to instruct the jury:

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1st. That if they shall find from the evidence that the Act of 1853, ch. 37, was duly passed and was duly accepted by the plaintiff, then the change of the corporate name cannot be relied on by the defendant, as a bar to the present suit.

2nd. Even if the jury shall find the facts set forth, as the hypothesis of the defendant's first prayer, but shall also find from the evidence, that said subscription was made in a subscription book, then in the hands of William Fell Johnson, and that said book had been previously placed in the hands of said Johnson by J. Henry Huppe, and that said Huppe, at the time he so placed said book in the hands of said Johnson, was one of the Directors of said company, and that he was authorized by said company to receive subscriptions to said stock, and that as a mode of receiving subscriptions he placed said book in the hands of said Johnson, and that for the same purpose he placed similar books in the hands of other persons at the same time; and shall further find, that shortly afterwards and before the month of November, 1853, said books were returned to the said Huppe, by said Johnson, and by the other persons respectively, and were by said Huppe reported to, and accepted by the President and Directors of said company as subscriptions to the capital stock of said company, so far as any of said subscriptions were unconditional, and as conditional subscriptions so far as any of said subscriptions were conditional; and shall further find, that on the 16th of November, 1853, the paper which has been offered in evidence as a report of the President of said company, to the stockholders of said company, was in fact made to the stockholders of the said company, by the President of said company, and that said report was accepted and adopted by the said stockholders; and shall further find, that the President and Directors of the said company, and the stockholders of the said com-

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pany, at the meeting of the said stockholders, held on the 16th of November, 1853, (in case the jury shall find that such meeting was held on said day, and that a report was made as aforesaid, and accepted as aforesaid) counted and considered the subscription of the defendant as a conditional subscription, according to the terms and purport thereof; and shall further find, from the evidence in the case, that the defendant never, at any time, gave notice to the said company, or any of its agents or officers that he withdrew his said subscription; and shall further find from the evidence in the cause that afterwards, on the 31st of March, 1857, the said company definitely adopted the "Green Spring" route, and on that day made the contract with Messrs. Irwin & Taylor, which has been offered in evidence, and shall also find that the agreement offered in evidence by the plaintiff was made by the said company with the Northern Central Railway company, on the 23d day of February, 1857, and shall further find that the road of the plaintiff was actually built on the track of the branch to "Green Spring," of the Baltimore and Susquehanna company, as it existed on the 28th of April, 1853, then the non-payment by the defendant of $1 per share, at the time of subscribing as aforesaid, in case such non-payment and subscription be found, is not of itself a bar to the present suit.

3rd. Even if the jury shall find from the evidence, that the road of the plaintiff was not commenced, in three years from the passage of the Act of 1852, ch. 304, but shall also find that the plaintiff never abandoned the intention of making said road; and shall further find that the Act of 1856, ch. 289, offered in evidence, was duly passed, and was duly accepted by the stockholders of the plaintiff, then the fact of such omissions to commence said road, if found by the jury, cannot avail the defendant as a bar to this suit.

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And the defendant offered the three following prayers:

1st. If the jury find from the evidence that the plaintiff was organized as a corporation in the month of February, 1853, and that the defendant made the subscription offered in evidence by the plaintiff, on the 28th day of April, 1853, and that said subscription was taken and obtained at Rockland, in Baltimore county, by William Fell Johnson, and that said Johnson then had the possession and control of the book, in which such subscription was made, and that there was not paid at the time of subscribing or afterwards by the defendant, the sum of one dollar on each share subscribed, and shall further find that no book for receiving subscriptions was opened at any specified time or place at Rockland aforesaid, and that no notice was published of the time and place of opening books at Rockland, and that less than 1500 shares of the stock of the company, had been subscribed for at the time of the defendant's subscription, then the plaintiff is not entitled to recover.

2nd. If the jury shall find the facts stated in the first prayer, and shall also find that the road of the plaintiff was not commenced in three years from the passage of the Act of Assembly of Maryland, entitled an Act to incorporate the Baltimore, Carroll and Frederick Rail Road company, passed at the session of the Legislature of 1852, ch. 304, and that the President and Directors of the plaintiff did not make any call for the payment of any part of the money subscribed by the defendant until the 25th day of June, 1857, that then the plaintiff is not entitled to recover.

3rd. If the jury find from the evidence, that the defendant made the subscription offered in evidence by the plaintiff, and that there was not paid by him at the time of subscribing or afterwards, one dollar per share for each share of stock subscribed, then the plaintiff is not entitled to recover.

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The first prayer of the plaintiff was conceded by the defendant, and the Court, MARTIN, J., granted the second and third prayers of the plaintiff, and rejected all the prayers of the defendant, and from this action of the Court this appeal is taken.

The cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH and COCHRAN, J.

I. Nevett Steele for the appellant.

1st. It is contended in behalf of the appellant, that his subscription to the stock of the appellee was invalid and not obligatory, because he was not required to pay, and did not pay, one dollar per share at the time of subscribing in conformity with the provisions of the appellee's charter. *Act* 1852, *ch.* 204, *sec.* 3. *Union Turnpike vs. Jenkins*, 1 *Caine's Cases*, 86, 93, *and* 94. *Highland Turnpike vs. McKean*, 11 *John.*, 98. *Crooker vs. Crane*, 21 *Wend.*, 218, 220, *and* 221. *Hibernia Turnpike vs. Henderson*, 8 *Serg. & Rawle*, 219, 222, 223, 225, *and* 227. 13 *Idem*, 252. *Massie vs. Poe*, 12 *Georgia*, 182, 184. *Angell & Ames on Corp., secs.* 527 *and* 529. *Penn. Nav. Co. vs. Dandridge*, 8 *G. & J.*, 248. *Maltby vs. R. R. Co.*, 15 *Md. Rep.*, 422. *Elysville Manf. Co. vs. Okisko Co.*, 5 *Md. Rep.*, 152, 158.

Where the charter of a company requires, that a certain amount shall be paid at the time of subscribing to its stock, it is to be presumed that such a peremptory requirement was inserted by the Legislature for some sufficient reason; and when a subscription is made to the stock of such company without the specified payment, the transaction is upon its face a palpable violation of the charter, and therefore ought not to be sustained by the Courts.

It is contended for the appellee that whatever may be the rule as to subscriptions received by commissioners, the company had a right, after one thousand shares had been

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subscribed and its organization effected, to dispose of the remaining nine thousand shares as it thought proper. If by this it is meant, that the company could sell this stock in any manner and at any price it pleased, the proposition is denied. No authority for such action is conferred by the charter, and to admit one stockholder at the price and on the terms fixed by the charter, and another at a different price and on different terms, would be a violation of that perfect equality among the stockholders which is a fundamental principle in this and all similar acts of incorporation. But if it is only meant, that the company could dispose of the untaken stock, by receiving subscriptions therefor, as was done in the case in 31 *Penn. State Rep.*, cited on the other side, then even if the proposition be correct, still the company in taking *subscriptions* was as much bound as the commissioners, to observe the terms on which alone subscriptions are authorized to be received by the charter.

2d. That the Court below erred in rejecting the first prayer of the appellant, because the said subscription was taken and received by Johnson without authority from the appellee, and without conforming to any of the requirements of its charter, and was therefore not binding; and because the said subscription was *conditional*, and therefore invalid as against public policy and for want of mutuality, or if not absolutely invalid, it could only have effect as a proposition to subscribe, and would only become obligatory, by its acceptance on the part of the appellee within a reasonable time, and in this case there was no such acceptance. *Act of* 1852, *ch.* 304, *secs.* 1, 3, 13, 20. *Troy & B. R. R. Co. vs. Tibbetts*, 18 *Barb.*, 297, 306, 310. *Charlotte & S. C. R. R. vs. Blakely*, 3 *Strob.*, 245. *Macedora Plank R. vs. Lepham*, 18 *Barb.*, 312. *Idem vs. Snediker*, *Id.*, 319. *Butternuts Turnpike vs. North*, 1 *Hill*, 518.

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Crawford R. vs. Lacey, 3 *Younge & Jervis*, 80. *Brinkerhoff vs. Utica R. R.*, 21 *Wend.*, 139. 1 *Parson's on Contracts*, (*last edition*,) 481, 482, 483. *Beckwith vs. Chever*, 1 *Foster*, 41. *Peru vs. Turner*, 1 *Fairfield*, (10 *Maine*,) 185. *Angell & Ames on Corp.*, 747, 748.

Not only was the subscription unauthorized because of its conditional form, but it was taken and received by one who had no authority whatever from the company to receive it. The company authorized Mr. Huppe to receive subscriptions in Carroll County, and Mr. Huppe gave Mr. Johnson a book to take subscriptions in Baltimore County. When therefore Mr. Johnson received the appellant's subscription in Baltimore County, manifestly the company was not bound by his act, as he was in no sense their agent, and the company not being bound, the appellant was not bound, and the transaction was a nullity. To this it is replied, that the act of Mr. Johnson was subsequently adopted and ratified, by the company, because the subscription was "by the stockholders and by the President and Directors of the company considered and counted as a conditional subscription for stock." It is submitted that this "considering and counting" stops short of amounting to a binding adoption by the company of Mr. Johnson's act; and besides, this was a private matter, unknown to the appellant, which the company might bring to light or not, as its interests dictated.

The condition annexed to the subscription of the appellant was as follows: "Provided the contemplated road shall be built on the present track of the existing branch to 'Green Spring,' of the Baltimore and Susquehanna Railroad." Such a subscription did not take stock, or make the subscriber a stockholder, but was merely a proposition, an offer to take stock upon the terms specified, if the company would agree to and accept them. When a contract or bargain is proposed by one party to another, it does not

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become a contract or bargain, until that other has accepted the proposition. This acceptance must be communicated within the time limited by the proposal, if it contains such a limitation, and if there be no time fixed, the acceptance must be made in a reasonable time. 1 *Parsons on Contracts*, 481, 482, *and* 483. Here the subscription was made early in the year 1853; the Act of 1852, ch. 304, by its 26th section, peremptorily provided that the road should be commenced in three years from the date of its passage in 1852, and if not so commenced that "then this Act shall be null and void;" the road in fact was not commenced until some time in 1857, under what was substantially a new charter; calls were not made until 1857 upon stockholders to pay instalments, and then they were published in the newspapers, but no notice was given to the appellant that the company had accepted his proposition, and that he was considered a stockholder; nor is there any evidence in the record that at any time or in any way the company had notified the appellant of its acceptance of his proposition.

3rd. That the appellee having been chartered in 1852, with a provision in its charter that the road should be commenced in three years from the passage of the Act, never having commenced its road or made calls for payment of stock subscriptions until 1857, was then by its long delay barred from making such calls, and was presumed in law to have abandoned the constructing of its road, and therefore the Court below was wrong in rejecting the 2nd prayer of the appellant, and granting the 3rd prayer of the appellee. *Codman vs. Rogers*, 10 *Pick.*, 112. *Laforge vs. Jayne*, 9 *Barr.*, 410. *Pittsburgh & C. R. R. vs. Byers*, 32 *Penn. State Rep.*, 22.

A subscription to stock is not the case of a simple debt due by the subscriber, but is a contract by which the subscriber agrees to pay, and the company undertakes to make

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the calls and deliver the stock. The terms of the contract are to be found in the subscription paper and the charter to which it refers; and the object of the contract is to carry the charter into effect. We are then to look to the contract, here as in other cases, to ascertain not only the acts which each party is to do, but also the time at which they are to be done; and if the terms of the contract do not expressly or by construction fix the time, then resort must be had to the common law doctrine of a reasonable time.

In this case the subscriber undertakes "to pay fifty dollars, &c. in such manner and proportions, and at such times, as shall be determined by the President and Directors of said company or a majority of them, *in pursuance of an Act of the General Assembly of Maryland*, entitled, an Act to incorporate," &c.

The subscription is thus made with express reference to the charter, and the right to make calls is to make them in pursuance of the charter. As has already been stated, it was provided by the 26th section of the Act of incorporation, that if the road was not commenced in three years from the date of its passage, the Act should be "null and void;" and the road was not commenced within the three years. It is said on the other side, that this was cause of forfeiture merely, and that as the forfeiture was never judicially declared at the instance of the State, the company continued to exist. Without impugning the correctness of the general principle thus asserted, its application to this case is denied.

It is not proposed to argue this question fully, because it is not deemed vital to the appellant's case. The Court will find the authorities which bear upon it collected and referred to in *Angell & Ames on Corp., secs.* 542, 537, 538, *and* 539.

4th. Without reference to the time at which the calls

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were made, the contract now sought to be enforced is not the contract into which the appellant entered. His answer to the action is, *non in hæc fœdera veni*. A contract to take stock in a road to be commenced in three years from 1852, does not bind him to take stock in a road to be commenced in six years from 1856. The subscription was made on the basis of the rights and duties set forth in the charter, as are all such subscriptions, and it would be a fraud on the appellant for the company to procure an alteration of its charter, and still insist on his coming in as a stockholder. At law, time is of the essence of the contract, and in the particular case, the provision that the road was to be speedily commenced, might well induce subscriptions. In the opinion of Judge NELSON, already referred to, it was held that the subscriber was discharged on this ground. Even a stockholder, who is ordinarily bound by the action of a majority of the stockholders, is not bound if they accept a fundamental change of their charter without his assent. But here the appellant was not a stockholder. He was not even a subscriber, in the ordinary sense of the term. He had made an offer to take stock, upon terms which had not been accepted; or, to adopt the view of the appellee, he was a conditional subscriber, and the condition had not been fulfilled at the time of the acceptance of the Act of 1856. He was therefore not then a stockholder, and was in no respect bound by the Company's action.

Wm. Schley for the appellee, argued:

1st. That the subscription made by the defendant, although made in a book then in the possession of Mr. Johnson, was, upon the proof given, a valid subscription, and binding on the defendant. When accepted by the appellee, it became a contract.

The company was organized, and a President and Directors were elected on the 14th of February, 1853, prior

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to defendant's subscription. The subscription, therefore, was made after the appellee had become an existing corporate body, although before the formal acceptance of the supplement, by which its name was changed. Even if, in case of a subscription, made whilst the commissioners were acting, it would be a good exception, (which, however, is not admitted;) the subscription was not received, after notice given, and at the time and place designated in such notice; yet, when the corporation had been ushered into existence, the commissioners were *functi officio*. They had fulfilled the commission with which they had been entrusted by the State. *Wellersburg and West Newton Plank Road Co. vs. Hoffman*, 9 *Md. Rep.*, 560, 569.

The corporation itself, thus having existence and capacity to contract, could receive a subscription, at any time, at any place, without notice, and through any agency, or *per directum*, for any untaken stock. The subscription of the appellant, when accepted by the company, imposed a common law liability, not a mere statutory obligation. *Rail Road Co. vs. Rodriguez*, 10 *Rich. S. C. Law Rep.*, 278. *Maltby vs. Northwestern R. R. Co.*, 16 *Md. Rep.*, 425, 426, 430, 445.

In cases where a part of the authorized stock is untaken, the corporation, after organization, may validly dispose of such stock. *Reese vs. Bank of Montgomery*, 31 *Penn. Rep.*, 78.

2nd. The non-payment of one dollar, at the time of the subscription, was not of the essence of the contract. It was not, as between the parties to the contract, an indispensable condition. The subscription, so far as the appellant is concerned, was complete and perfect when he subscribed for the shares, and when his subscription was accepted by the company. It was his own default that he did not pay the instalment, if it was his statutory duty so to pay, at the moment of subscribing. It was competent, however, for

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the company, in any view that may be taken, to waive the immediate payment, and to rely upon the efficacy of its future calls.

Even if this subscription had been received by the commissioners, the non-payment of one dollar per share, at the time of subscribing, would not have rendered the subscription a nullity. The language of the Act is directory, not imperative. It is not made a condition precedent to the perfecting of the subscription.

It is not an integral, elementary, constituent part of the subscription; but, in consequence of the subscription, the Act made it the duty of the subscribers to pay, and if the commissioners chose to waive it, they surely could do so, at their own risk. The company could not be affected by their omission to exact the payment. Indeed, the commissioners would be accountable for the money in the same manner as if actually received.

The following cases are authorities on this point: 2 *American Railway Cases*, 226, *and notes*. *Vermont C. C. R. R. Co. vs. Clayes*, 21 *Vermont*, 30. *Wight vs. R. R. Co.*, 16 *B. Monroe*, 5. *Judah vs. Life Ins. Co.*, 4 *Indiana*, 337, 338. *Ill. Riv. R. R. Co. vs. Zimmer, &c.*, 20 *Ill.*, 654. *Eastern Plank Road Co. vs. Vaughan*, 20 *Barbour*, 155. *R. W. Plank Road Co. vs. Wetsel*, 21 *Barbour*, 56. *Abbott vs. Aspinwall*, 26 *Barbour*, 202. *V. R. R. Co. vs. McKean*, 12 *Louisiana Rep.*, 638. *R. R. Co. vs. Chandler*, 13 *Metcalf*, 311. *Chaffin vs. Cummings*, 37 *Maine*, 76. *Henry et al. vs. R. R. Co.*, 17 *Ohio*, 187. *Pierce on American Rail Road Law*, 64.

In some of the cases awaiting the decision of this case, this question is involved, otherwise it would not have been considered. For, in this case, the subscription was not received by the commissioners, but by the company after organization. The provisions of the Act in relation to the payment of one dollar per share, whether directory or es-

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sential, were intended to apply to subscriptions received by the commissioners. They were not intended as a limitation upon the powers of the corporation, when it should come into being. In the second section of the Act, it is said that the corporation "shall have, enjoy, and may exercise all the powers, rights and privileges, which other corporations may lawfully do, for the purposes mentioned in this Act."

The question then arises, whether the corporation could dispose of its untaken stock. Now, the capital was fixed at five hundred thousand dollars, in shares of fifty dollars each, that is, ten thousand shares. On the subscription of one thousand and eighty-six shares, however, it was organized; leaving nearly nine-tenths of the stock untaken. In fixing the capital at the designated amount, the Legislature assumed that the cost of the road would require, at least, that amount of capital; and the 13th section contemplates the possibility of the necessity of *double* the amount of capital. Now, who is to dispose of the untaken stock? Not the commissioners; for, after calling together the subscribers, and laying before them their books of subscription, they had fulfilled their duty; they were "*functi officio.*" *Plank Road vs. Hoffman*, 9 *Md. Rep.*, 569.

The power to dispose of the untaken stock was within the general powers of the corporation. The capital of the company when organized, the provided means for constructing the road, consisted, in part, of the untaken shares: and of which shares the corporation had, of necessity, the *jus dispodendi*, as owner thereof. It could use those shares, instead of money, in purchasing the right of way, in the construction of the road, or in disposing of them at par for money. *Mann vs. Cooke*, 20 *Conn. Rep.*, 178. *S. C.* 2*d American Railway Cases*, 124. *Reese vs. Bank of Montgomery*, 31 *Pa. State Rep.*, 78. *Rail Road*

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Co. vs. Rodriguez, 10 *Rich. S. C. Law Rep.*, 278. *Plank Road Co. vs. Hoffman*, 9 *Md. Rep.*, 559. *Maltby vs. N. W. Va. R. R. Co.*, 16 *Md. Rep.*, 422.

If, then, the company could dispose of its stock, the transaction was essentially a common law contract, made between competent parties. It was not necessary to fix a time and place for making the contract, or to give public notice thereof, or to require a cash payment, as a condition precedent to the making and perfection of the contract.

Recent decisions place corporations, when acting within the scope of their powers, very much in the condition of natural persons, both in relation to torts and to contracts. A corporation may commit an assault and battery, may act maliciously, and be guilty of publishing a libel; and may commit a fraud, and may be bound by estoppels *in pais*. Within the scope of its granted powers, and for the purposes of its incorporation, it may make any contract, not illegal or immoral; and there can be no pretence of want of mutuality in a contract made by a corporation, where both parties may legally and validly perform their reciprocal engagements. The objection that a contract is without mutuality is very different from the objection that a contract by a corporation is *ultra vires*. The case of *The Pa. Steam Navigation Co. vs. Dandridge*, 8 *G. & J.*, 248, is of the latter description. But the test of want of mutuality is properly stated in 2 *Williams' Saunders*, (*note i*,) to be, where one party is left without a valid consideration for his promises. To the same effect are *Laythorp vs. Bryant*, 29 *Eng. C. L. Rep.*, 472. *Morton vs. Burn*, 34 *Eng. C. L. Rep.*, 21, 22. *L'Amoreux vs. Gould*, 3 *Selden*, 349. *R. R. Co. vs. Mason*, 2 *Smith*, (16 *N. Y.*,) 451.

3rd. Was the defendant's subscription void because it was made conditional as to the route of the road? There are cases in which such conditions are discouraged, and others in which they are denounced as against public

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policy. But the company is authorized to select the route between the *termini;* and the presumption always is, that the best route will be selected. It is frequently a matter of controversy between localities, as to the most eligible route; and persons residing in a particular neighborhood, may favor the enterprize if the route is to pass through or near it; but may not be willing to subscribe at all, if the road should be differently located. A party, therefore, may be willing to subscribe conditionally, that is to say, if the road shall be located upon a particular route, and the company may validly accept it. And (if the subscription remaining unrevoked,) the designated route is selected, then the subscription becomes absolute.

How is this against public policy? The sovereign power has committed to the corporation the selection of the route for the road; and the terms of subscription are not inconsistent with the honest and faithful exercise of this power. I shall leave the point, referring to the following authorities: *Pierce on Rail Road Law*, 71. *L'Amoureux vs. Gould*, 3*rd Selden*, 349. *McMillan vs. Maysville and Lexington Rail Road Company*, 15*th B. Monroe*, 218. *Henderson and Nashville Rail Road, vs. Seavell*, 16*th B. Monroe*, 358. *Cumberland Valley Rail Road Company vs. Baab*, 9*th Watts*, 458. *Rhey vs. The Ebensberg and Susquehanna Plank Road Company*, 27*th Pennsylvania State Reports*, 261.

4th. Was there a forfeiture by the corporation of its chartered rights, by reason of its failure to commence the road within the period of three years from the passage of the Act of 1852?

It is conceded that the language of the 26th section of the Act of 1852, ch. 304, is very peremptory, and is unambiguous; and it is also conceded that the reconnoissance for the purpose of deciding the route, was

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not such a commencement of the road, within three years, as was required by said 26th section. But it must not be forgotten, that this is the language of a sovereign in a grant of corporate powers; and it is in the nature of a condition subsequent. If it were a case of a condition precedent, the case would be essentially different. It is a clause of forfeiture, and must operate, if at all, in defeasance of vested rights. But, unless and until the sovereign shall take advantage of the forfeiture, the granted rights continue.

Individuals cannot enforce the forfeiture; and the sovereign power may not choose to do so, but, on the contrary, may waive the forfeiture. In this particular case, the sovereign not only did not claim the forfeiture for condition broken; but, by the Act of 1856, ch. 289, confirmed the company in its chartered rights, "as though said 26th section had not been a part of said original Act." This doctrine is very clearly and ably elucidated in the case of the *Canal Company vs. The Baltimore & Ohio Rail Road Company, in 4th Gill and Johnson*, 121 to 129; and the applicability of that authority to this case will more plainly appear by comparing the 18th section of the Act of 1784, ch. 33, with the 26th section of the Act of 1852, ch. 304. The Court is also referred to the following cases: *Planters' Bank vs. The Bank of Alexandria, 10th Gill and Johnson*, 356. *Frederick Female Seminary vs. the State, 9th Gill's Rep.*, 404. See also the Act of 1832, ch. 306.

Since the Constitution of 1852, however, the end proposed by the Act of 1832, might have been obtained, simply, by a repeal of the Act of 1852. (Constitution of 1832, Article 3, section 47.)

But not only was the Act not repealed, but by the Act of 1856, as we have seen, the forfeiture was expressly waived. See also, for illustration: *Comyn's Landlord and Tenant*, (*6th Law Lib.*) *Reid vs. Parsons*, 2*nd Chit-*

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ty's Rep., 247. (18*th English Common Law Rep.*, 322.) *Webster vs. Hooper*, 14*th Howard's Rep.*, 501.

The moment it is remembered that the only parties to the grant are the State and the Corporation, it will be manifest that no third party could enforce what the State alone could enforce, and was competent to waive. *Abbott vs. Aspinwall*, 26*th Barbour's Rep.*, 202.

5th. Did the plaintiff, by the delay in commencing the road, and in making the calls for the instalments, discharge the defendant from liability on his subscription? The proposition, affirmed by the defendant's second prayer, is this: that as more than three years had elapsed from the passage of the Act of 1852, and as no calls were made by the plaintiff for any part of his subscription until the 28th of June, 1857, the plaintiff was not entitled to recover. In the printed brief of the appellant these facts are relied on, as creating a "presumption in law," that the corporation had abandoned the construction of its road.

The presumption thus claimed by the defendant, is not one of fact but of law. It did not refer to the *onus probandi;* for there was uncontradicted proof, that, although the commencement of the road was unavoidably delayed, the company never did, by any act, express any intention to abandon the making of the road. But the objection goes to the very cause of action; to the right to recover.

Whatever may be the law elsewhere, the lapse of time, in Maryland, in case of a suit at law upon a contract, goes to the remedy, not to the right; and as to the remedy, the length of time, that will bar recovery, is fixed by the statute of limitations.

Bowie, C. J., delivered the opinion of this Court.

The General Assembly, at January session, 1852, incorporated "The Baltimore, Carroll and Frederick Rail Road

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Company," with a clause prescribing certain preliminaries usually observed in opening the books and taking subscriptions for stock, prior to the organization of a company, among others, the pre-payment of one dollar per share on every share subscribed; also requiring the road therein contemplated, to be commenced within three years and finished within ten years from the passage of the Act, otherwise the same should be null and void. Books were opened by the Commissioners, the requisite number of shares subscribed, a Board of Directors and a President were elected, and the company fully organized.

After this organization, the appellant on the 28th April, 1853, subscribed for ten shares, in one of the subscription books, held by a Mr. Johnson, upon *the terms and conditions prescribed therein* and the charter, with this condition annexed: "provided the said contemplated road should be built on the then present track of the then existing branch to 'Green Spring,' of the Baltimore and Susquehanna Rail Road;" but did not pay the sum of one dollar per share, required by the charter to be paid to the commissioners, at the time of subscribing.

The name of the corporation was subsequently changed by Act of Assembly, to that of "The Western Maryland Rail Road Company." The defendant's subscription, with others, was returned to the stockholders, and classified among the conditional subscriptions. The construction of the road not having been commenced within the time prescribed by the original charter, the Act of 1856, ch. 289, was passed, waiving all claims of forfeiture, by reason of the company's failure to comply with any of the provisions of the Act of incorporation, and allowing six years for the commencement, and twelve years from the passage of the Act, for the completion of the road.

The "Green Spring" branch of the Baltimore & Susquehanna Rail Road was adopted by the appellee on the 31st

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of March, 1857, and the road put under contract for construction. No calls were made for payment of subscriptions until the 25th of June, 1857. The appellee never indicated, affirmatively, any intention of abandoning the work of the appellant; never affirmatively withdrew his subscription, or attended any meeting of the stockholders or subscribers to the stock.

Several calls for instalments having been made and refused, this action was brought on the 1st of February, 1861. The prayers offered by the plaintiff, (now appellee,) and granted by the Court, present three negative propositions:

1st. That the change in the corporate name of the appellee by the Act of 1853, ch. 37, is not a bar to the present action.

2d. That upon the finding of the facts therein before specified, the non-payment of one dollar per share by the defendant, at the time of his supposed subscription, *is not of itself a bar* to the present action.

3d. That the failure to commence the work within three years from the Act of incorporation, (1852, ch. 304,) the Act of 1856, ch. 289, being duly passed and accepted by the stockholders of the plaintiff, is not a bar to this suit.

The first proposition is admitted, but the second and third propositions are specially denied by the prayers of the defendant, which were rejected by the Court, and constitute the ground of this appeal.

The first and third prayers of the appellant are the converse of the appellee's second; the appellant's second prayer, of the appellee's third.

The learned counsel differ as to the range of the first and third prayers. The appellee contends, they present only the question of the effect of the non-payment of the cash instalment of one dollar at the time of subscribing; on the other hand, it is insisted they embrace the condi-

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tional character of the subscription, and the validity of such. It is observable that these prayers refer specifically to the subscription, in the following terms: "and that *the defendant made the subscription offered in evidence by the plaintiff*," etc., as one of the facts upon which the proposition of the defendant was based. This specific reference in each of the prayers under consideration, was not merely introductory to the other facts connected with it, but called for an examination of the subscription itself, its character and conditions.

The subscription of the appellant is not set out in terms in the bill of exceptions, but referred to as a conditional subscription. In the *nar* and appellee's brief, it is set out "*in totidem verbis*," as therein before cited.

Assuming that the evidence, offered by the plaintiff (and refused to the defendant in his prayer,) corresponded with the subscription set out in the *nar*, the legal sufficiency of such subscription, was necessarily brought before the Court, by the first and third prayers of the defendant, whether the right of action depended on the prepayment of the deposit, or the conditional character of the subscription itself. The supposed contract being in writing, its validity was a question for the Court, and however the latter view may have been overlooked in the discussion of the former, it seems necessarily involved in the disposal of these prayers.

The first point presented by the prayers arises under the 3rd section of the Act of 1852, ch. 304, incorporating the appellee, which directs that "upon every subscription, there shall be paid at the time of subscribing, to the company or their agents, appointed to receive such subscription, the sum of one dollar on every share subscribed." As there are other cases involving the construction of this section, we are requested to interpret it, not only as it may operate upon the facts in this case, but upon subscrip-

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tions made to commissioners or their agents, prior to the organization of the company. It is contended that this clause applies peculiarly and solely to the latter class of subscriptions, as to which, it is only directory and not indispensable. The class of cases maintaining the contrary, it is insisted, originated in the decision of the case of *Jenkins vs. The Union Turnpike Company*, by the Court of Errors in New York, 1 *Carr's Cases in Error*, 86, which was contrary to the better opinion (as it said) of the Supreme Court ot New York, and make only a "*suite d'erreurs.*" The defect or vice of the original decision is not pointed out, but it is impeached as emanating from a Court, constituted of laymen, as well as lawyers, and of less authority than the tribunal whose decision it reviewed and reversed. A decision not universally adopted, but questioned, doubted and overruled. We are invoked not to follow such precedents, upon a mere comparison of facts, but to apply the judicial mind to a consideration of the principles of law applicable to them. With this earnest exhortation in view, we have examined the series of cases referred to, and will concisely state the result.

The controlling principle, on which those cases are founded is, that all charters or Acts under which highways are erected, and franchise and privileges conferred, are deputations of public power or authority to be strictly construed. The subscription for stock must be founded on a valid consideration, and constitute a contract binding on both parties "*eo instanti.*" The promise of the subscriber being based on the promise or expectation of becoming a stockholder, if the right to the stock is not consummated by payment of the deposit, the obligation to pay the subscription is not binding.

Chancellor LANSING, treating the Act, under which the subscription was made in that case as a public law, the provisions of which he must notice officially whether

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pleaded or not, thus defines the duties of the commissioners: From the record it appears, that commissioners were appointed by the statute, to perform certain duties particularly described. They were to receive subscriptions and to receive for the benefit of the defendants (in error) $10 on each share of the stock of their company. The plaintiff (in error) subscribed, but it does not appear that he paid. At the time these steps were taken, the corporation described in the Act, was not in existence. It was incapable of contracting. The acts to be performed by the commissioners were merely preparatory to its creation. To give effect to their acts, their power must be strictly pursued. * * They were directed to exact from the persons who were to be admitted members of the corporation, both subscription and payment, as a condition precedent to their admission. If they omitted either to subscribe or to pay, they did not come within the terms of admission. 1 *Caine's Cases in Error*, 94.

TILGHMAN, C. J., in the case of *The Hibernia Turnpike Company vs. Henderson*, 8 *Serg. & Rawle*, (which was a subscription to commissioners before the organization of the corporation,) enlarged upon the principles of public policy, which required a rigid adherence to the letter of the law, and strict compliance with the requisition of prepayment, in all subscriptions made to commissioners. "If (he says) persons are permitted to subscribe without the previous payment of five dollars a share, large subscriptions may be made, which would not otherwise have been made, by those who are anxious to give a direction to the road, which may benefit themselves, at the expense of the public. The case is reduced to this simple question: Can a contract be enforced in a Court of Justice, which was made in violation of an Act of Assembly. It is not the first time the question has been asked in this Court, and it has received but one answer: "It cannot be enforced." He refers to the decision of the

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Court of Errors in New York, 1 *Caine's Cases in Error*, as settling the law in that State.

GIBSON, J., concurred, replying to the argument (which has been urged in this case,) that prepayment was a condition which might be waived, it being intended only for the benefit of the corporation. He asks, "What was the consideration for the charter? Undoubtedly, the benefit which was expected to result to the public; not the profit that might be made by the stockholders. The State, therefore, was a party, and had an interest in preventing the scheme from being turned into a bubble, etc., *vide* p. 225. The design of the deposit was to prevent the subscription list from being filled with the names of nominal stockholders and the creatures of others." 226. * * *

Every contract, where the consideration is promise for promise, must be obligatory on both parties or both will be at liberty to recede—the promise which is the consideration of that on which the action is brought, must be such as the plaintiff had power to perform. I do not say there was an express promise here that the defendant should enjoy the rights and privileges of a corporator; but certainly that was understood as being the consideration on which he subscribed. But the company could introduce no one as a member in any other way than that pointed out by the Act of incorporation, p. 227; if they could, it would be requisite that the defendant's title should have been good when he subscribed; otherwise the contract would be without mutuality, and if he acquired no right which he could enforce against the will of the plaintiffs, he incurred no responsibility, 228.

In *Crooke vs. Crane*, 21 *Wend.*, the question being whether the commissioners, appointed to open books to receive subscriptions, were authorized to receive checks of subscribers in payment of the sum required to be paid at the time of subscription.

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COWEN, J., said: "I am, therefore, strongly inclined to the opinion that the check in question was void, as contrary to the policy of the statute. Nor can there be any doubt, I imagine, that the contemplated corporation, if I am right as to the facts, failed of going into existence for want of the proper payments as a *condition precedent.* Such is the doctrine laid down by Chancellor LANSING in *Jenkins vs. Union Turnpike Company,* 1 *Caine's Cases in Error,* 934, and recognized by this Court in *Goshen Turnpike Company vs. Horton,* 9 *Johns. Rep.,* 217, *and Highland Turnpike Company vs. McKean,* 11 *Johns. Rep.,* 98. *Dutchess Cotton Manuf'y. vs. Davis,* 14 *Johns. Rep.,* 238.

These cases go further, each subscriber must pay as a condition to his own liability attaching. Payment was a requisite which the commissioners could not waive. *Starr vs. Scott,* 8 *Conn. Rep.,* 483.

The case in 21 *Vt. Rep.,* cited by the appellee, to the contrary, has several peculiar features which distinguish it from the class of cases requiring prepayment of the deposit, as essential to the contract. The defendant, in that case, was one of the original associators, and had signed an instrument prior to the Act of incorporation, by which the subscribers agreed to take, and did take the number of shares affixed to their respective names. The defendant subscribed for fifty shares of the stock. The note in question was given for the first five dollars payable on each respective share, which was received in settlement of the first instalment; by the subscription paper it appears there were several subscribers for stock prior to the defendant, and by the Act of incorporation each subscriber *per se* became a corporator.

These facts were deemed sufficient to show the corporation was "in *esse* at the time of taking the note, and capable of taking the promise through their agents, the commissioners." Upon all these peculiar circumstances, it was held the action on the note was maintainable.

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The learned Judge delivering the opinion of the Court, though questioning whether the opinion of the Supreme Court or Court of Errors, in the case in 1 *Caine's Cases in Error*, was the better opinion, distinguishes that case from the one under his consideration.

The case in 16 *B. Monroe*, 5, declaring prepayment of the deposit to the commissioners, is not essential to the validity of the subscription, presents the anomaly of a decision founded on a case previously and notoriously reversed, without apparent knowlege of the reversal. The Judge in delivering the opinion says: "The decision of the Court in the case of *The Union Turnpike Company vs. Jenkins*, 1 *Caine's Rep.*, sustains the views expressed in this opinion; and it is only the opinion of the dissenting Judge that is cited in *Angell & Ames on Corporations*, and referred to by the counsel for the appellants." He seems wholly unaware that the opinion of the dissenting Judge had been affirmed by the Court of Errors, and that of the majority of the Supreme Court on which he relied, overruled.

The 20*th Ill.*, 656, deciding in the same way, relies only on 16 *B. Monroe*, 5, *and* 21 *Vt. Rep.*, 30, which we have before shown, was marked by very peculiar features, distinguishing it from the *Union Turnpike Co. vs. Jenkins*, and therefore not in point.

The case in 17th *Ohio*, 191, cited to the same point by the appellee, is a mere dictum, sustained by neither authority or reason.

It would appear from this comparison of the cases cited, that *Jenkins vs. The Union Turnpike Company*, 1 *Caine's Cases in Error*, has not been overruled, or abandoned in principle in succeeding cases within the same category; but it has been questioned, criticised and departed from, where the facts would warrant a departure.

It is still recognized as a leading case, not only in the

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State of New York, but in several other States, with such weight of authority and reason as commands our respect in similar cases.

If not expressly adopted in this State, it has been referred to in terms which recognized the principles on which it was decided as properly applied under the circumstances.

In the case of *Elysville Manufacturing Co. vs. Okisko Company*, it was objected that the appellant had no power under its charter to subscribe to the stock of the appellee, and if it had, the one before the Court was not binding, because at the time of the subscription, the cash payment was not made. In support of the latter proposition the case in 1 *Caine's Rep.*, 381, was relied on. This Court said that case is clearly distinguishable from the one before us. There, no payment was made either at the time of subscription or thereafter by the person whom it was attempted to make responsible on his subscription, while here the whole amount of the subscription was paid; in other words it is a completely executed contract. In the case referred to, the Court evidently founded their decision on the want of mutuality. "The subscriber not having paid in conformity with the authorized terms of subscription, could not have compelled the transfer of the stock to himself, he not having in any way, in part or in whole, performed the contract." 5 *Md. Rep.*, 158.

The preponderance of authority in favor of a strict compliance with the provisions of the charter, in cases of subscription, prior to the organization of the company, is such as is not to be disregarded. This Court has said, "there is no doubt that in general, a strict compliance must be shown with the provisions of the charter, but in some cases a compliance will be presumed and in others it may be waived." 16 *Md. Rep.*, 444. The distinctions between subscriptions prior and subsequent to organ-

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ization, is clearly recognized in 9 *Md. Rep.*, 568, in this language:

"Commissioners are appointed to receive subscriptions to stock for the purpose of giving the subscribers a right to organize as a corporation under the charter. So soon, however, as the organization takes place, the authority of the commissioners ceases; and all corporate powers conferred by the charter, vest in the body politic. Such, at least, is the general rule, applying in every case where there is no special provision to the contrary. It was further held, that in that case, there were no provisions requiring the corporation after organization, to have subscriptions taken by commissioners and in no other mode."

Hence in this case the corporation being organized by the subscription of the necessary proportion of the stock, and election of officers, succeeded to the power previously vested in the commissioners, to sell and dispose of the remaining shares, without regard to the conditions imposed on them. The act of the agent taking the subscription, being recognized by the corporation by receiving and registering the subscription, among the conditional subscriptions, was equivalent to a previous appointment of the agent for that purpose.

The objection that the subscription was void because conditional and contrary to public policy, is strongly supported by the authority cited by the appellant. 1 *Hill*, 518. 18 *Barbour*, 318. But these cases turn upon the provisions of the local statutes, and the subscriptions were made to commissioners prior to the formation of the companies, for the most part.

The first ground upon which the validity of conditional subscriptions has been impeached in the cases before cited, viz: that a contract to be binding must be "concurrent and obligatory upon each at the same time," (as decided in

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18 *Barb.*, 318, and 21 *Wend.*, 139,) has been in more recent cases abandoned, and it is said that such a subscription is a continuing offer, until withdrawn.

But when the offer was accepted the minds of the parties met and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiff constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely the same, as if the parties had met at the time of the acceptance and the offer had then been made and accepted and the bargain completed at once. *Boston & Maine R. R. vs. Bartlett*, 3 *Cush.*, 227. *Conn. & Pass. R. R. vs. Baily*, 24 *Vt. Rep.*, 478. *Troy Acad'y vs. Nelson*, 24 *Vt. Rep.*, 189.

The second objection, that conditional subscriptions are contrary to public policy, is said to be peculiar to New York, and not followed in other States. *Vide Pierce on Railways*, *p.* 71. In 15 *B. Monroe*, 235, the Court finds the power of the corporation to accept such conditional subscriptions, under the clause of the charter of the company in that case, authorizing the President and Directors to dispose of their unsubscribed stock for the benefit of the company, and declares it does not seem to be prohibited by sound policy; that such construction is sanctioned by general usage under similar provisions in other charters. *Vide* also, 16 *B. Monroe*, 364, to the same effect. This conclusion seems to follow necessarily, from the doctrine that a conditional subscription is but a continuing offer, which is final and absolute when accepted; all subscriptions becoming thus ultimately unconditional and absolute.

If the corporation after organization, may dispose of

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their stock without limitation, except so far as expressly restrained by their charter, and a conditional agreement when accepted is equivalent to an absolute contract, it would seem a necessary consequence that all contracts for stock in consideration of a particular location, when complied with by the company, would be as binding on both parties as if the contract had been absolute and unconditional. For however adverse to public policy such conditions prior to the formation of the corporation, the location and construction of the road is the peculiar province and duty of the President and Directors, and a contract made by them in execution of their corporate powers must be presumed to be made in promotion of the public interest, unless shown to the contrary.

The second prayer of the appellant, and third of the appellee, require the Court to determine the legal effect on the right of action of the appellees, of their non-compliance with the section of the original charter, requiring the road to be commenced within three years ; and of the omission of the appellees, to make any call for the payment of any part of the money subscribed by the appellant, until the 25th of June, 1857.

As to the first branch of this inquiry, it is well settled that non-compliance with the provisions of a charter, is not a matter of defence collaterally between corporations and its stockholders or debtors. It belongs exclusively to the State, to determine whether it will exercise its prerogative of forfeiting or annulling the charter. 9 *Wend. Rep.*, 351. 4 *Johns. Ch. Rep.*, 379. *Angell & Ames on Corp.*, 3*d ed.*, 747. 4 *Eng. L. & Eq.*, 455. 24 *Vt.*, 476. *The Planters Bank vs. The Bank of Alexandria*, 10 *G. & J.*, 346.

The modification of the charter in enlarging the time of commencing and completing the work, is one of those inci-

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dents to all charters which comes within the constitutional power of the State to exercise, and with due notice of which, all its citizens must be presumed to contract.

It is not one of those fundamental radical changes, which diverts the funds from the original purpose to which they were dedicated, or is manifestly prejudicial to the stockholder, but comes within that class of cases in which the change was held to be auxiliary to the original object of the incorporation, and beneficial to the stockholders, *vide Pierce on Railroad Law, p.* 78, *note* 2, and authorities there cited.

As to the effect of the omission to make calls:

Lapse of time, not amounting to the bar of limitations, is not a defence to an action at law. The contract in this case according to the more recent authorities was a continuing offer, which was accepted by the appellees by the adoption of the "Green Spring" route on the 31st of March, 1857. No calls were made until the 25th of June following. The statute of limitations did not begin to run until the several calls were due. 6 *H. & J.*, 57.

The objection to a continuing offer, that it suspends indefinitely the liability of the conditional subscribers is sufficiently answered by the consideration, that all such offers are subject to retraction, and may be recalled, if their acceptance is unreasonably deferred. It results from these views, that the judgment below must be affirmed.

Judgment affirmed.

(Decided May 12th, 1866.)

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MARY E. MYERS, EXECUTRIX OF CHARLES MYERS, DECEASED, *vs.* JAMES S. FORBES AND EDWARD R. SPARKS, SHERIFF.

SPECIFIC PERFORMANCE OF CONTRACT.—The term or duration of a lease is an essential part of it, and in the absence of any stipulation in that respect, a Court of Equity cannot decree a specific performance of a contract to lease. *Quaere?* Whether it is possible to supply such a defect in the written paper by parol evidence?

APPEAL from the Circuit Court of Baltimore City.

The appellant filed her bill in the Circuit Court for Baltimore City, alleging as follows:

"That your oratrix's late husband, Charles Myers, her now testator, in his life time, to wit: on the twenty-eighth day of November, 1860, entered into a contract with a certain James S. Forbes, carpenter of said city, to do and perform the carpenter's work in and about a certain warehouse which he, the said Charles Myers, was at that time about to build, at the corner of South street and Exchange Place in said city; that by the terms of said contract, he, the said Charles Myers, agreed to pay the said Forbes a certain price, for the doing and executing of said carpenter's work at its completion, provided the said Forbes took and received from said Charles Myers a lease of certain lots of ground on the east side of Spring street in said city, as will more fully appear by reference to said contract herewith filed, marked complainant's exhibit M. E. M., No. 1, and prayed to be taken as a part of this bill.

"Your oratrix further shows, that the said Charles Myers has departed this life leaving a last will and testament, and appointing your oratrix sole executrix thereof, and that letters testamentary have been issued by the Orphans' Court of Baltimore city, on said estate to her, as will more fully appear by reference to complainant's exhibit M. E. M. No. 2, and that said property at the corner of South

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street and Exchange Place, (which is leasehold property,) is now in her possession as executrix as aforesaid.

"Your oratrix further shows, that said Charles Myers in his life time often requested said Forbes to comply with the terms of his said contract, and execute and receive said lease, as specified in said contract, but that he refused so to do. Your oratrix further shows, that said carpenter's work on said building, has long since been completed, and that said Forbes has filed with the clerk of the Superior Court of Baltimore city, a mechanic's lien for the whole amount of the same on which there is now due the sum of four hundred and three dollars and sixty-nine cents, which sum your oratrix, as executrix as aforesaid, has tendered to the said Forbes, and offered to pay him on his executing and receiving said leases, as set forth and agreed in said contract herewith filed, which leases have been drawn and actually executed by the said Charles Myers, and your oratrix as his wife, in the life time of the said Charles. But yet, so it is, that although said Forbes admits that said sum of $403.69, is the entire amount due him under said contract, and said lien, he refuses to execute said leases and receive said sum, as he is bound in law and equity to do, but has issued to the next September term of the said Superior Court *scire facias* on said mechanic's lien, and the Sheriff of Baltimore City is about to advertise the said property, by way of giving the notice required by the mechanic's lien law of the State of Maryland, although your oratrix has made said tender to said Forbes which she here again repeats and offers to pay him on his executing said leases and complying with the terms of said contract, said sum which is the entire amount he claims to be due him by virtue of said contract, all of which is contrary to equity and good conscience on the part of said Forbes, and to the manifest injury of your oratrix, and in violation of her rights. The bill then prays that the said James S.

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Forbes, and his agents and servants, and particularly the Sheriff of Baltimore City, may be restrained from further proceeding in said *scire facias* on said mechanic's lien, and from advertising said notice under said lien law; and that said James S. Forbes may be compelled to execute and receive said leases of said lots, and that your oratrix may have a specific performance of said contract, and for general relief. The contract referred to as marked M. E. M., No. 1, is set forth in the opinion of this Court."

On the foregoing bill an injunction was issued, and the defendant filed his answer, after which a commission was issued to take testimony, the substance of which as far as it bears upon the questions passed on in this Court is stated in the opinion of this Court.

The Court below, (ALEXANDER, J.,) passed an order dissolving the injunction and dismissing the bill, and from this order the present appeal is taken.

This cause was argued before BOWIE, C. J., and BARTOL, GOLDSBOROUGH, COCHRAN and WEISEL, J.

B. F. Horwitz for the appellant.

It is submitted that this being a contract respecting real estate and being in writing, certain, fair in all its parts, for an adequate consideration and capable of execution, that a Court of Equity will decree its specific performance; which is as much a matter of course as for a Court of law to give damages for a breach of it; and *especially* as there was an entire performance of the contract on the part of the appellant's testator. *Smoot vs. Rea*, 19 *Md. Rep.*, 398. *Story's Equity Jurisprudence, secs.* 722 *and* 751. *Furnival vs. Crew*, 3 *Atkyns*, 87. *Williams vs. Mayor of Annapolis*, 6 *H. & J.*, 529, *and see page* 533. *Sullivan vs. Tuck*, 1 *Md. Ch. Dec.*, 59, 63. *Tritton vs. Foote*, 2

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Brown's Ch. Rep., 636. *Russell vs. Davison*, 2 *Brown's Ch. Rep.*, 639, *note. Leading Cases in Equity, Hare & Wallace's notes, p.* 645. *Howard vs. Moore*, 4 *Sneed*, (*Tenn.*,) 317. *Chance vs. Beall*, 20 *Geo.*, 143.

It was contended below by the defendant, Forbes, and it is presumed will be urged before this tribunal, that the specific performance of this contract should not be decreed for the five following reasons :—

1st. Because Mr. Myers in his life-time *waived and abandoned* the contract.

2nd. Because, if not abandoned, the remedy is at law by action for a breach of contract and a Court of Equity has no jurisdiction to grant relief.

3rd. Because of *laches* on the part of complainant.

4th. Because Myers agreed to lease one lot to Hammill and did execute a lease to him.

5th. Because the contract is imperfect in not stating the term for which the leases were to continue.

1st. It was contended, *seriously*, that Myers abandoned and waived this *written* contract for two reasons, first, because it is alleged in the answer, that Forbes did not get money whenever he called for it ; and secondly, because *nothing* was said about the lots at the final settlement on the 28th May, 1861. Mr. Forbes took it for granted the contract to lease was abandoned. As to the first reason, it is submitted there is no evidence to sustain it, and if there were it would amount to nothing—there was no obligation on Myers' part to pay before the work was performed in full. *Drummond vs. Burrell*, 13 *Wend.*, 308. *Ellicott vs. Peterson*, 4 *Md. Rep.*, 489.

As to the second reason, it is only necessary to refer to the testimony of Forbes' witness, Allen, to show that he never so supposed, but that he got out the work for those houses in June and July, 1861, just before he left the country. But it is submitted, that if Mr. Forbes did

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take it for granted, because nothing was said on the subject, that therefore this written contract was abandoned, that would hardly in law be considered a waiver and abandonment on Myers' part.

2nd. The second question raised by defendant is the one on which the learned Judge below decided the case. It has already been considered under the appellant's first point. As to true test of jurisdiction see *Bolgiano vs. Cook*, 19 *Md. Rep.*, 394. It must be remembered too that an injunction was asked for and granted.

3rd. It is alleged that there has been laches on the part of the complainant and her testator, although the evidence shows that the original deed of Myers was given to Forbes "shortly after" the signing of the contract, on the 28th of November, 1860, to take to Thompson to have the leases prepared; that Myers and wife executed them early in 1861; that he demanded and received ground rent and taxes from Keyser, Forbes' agent, in January, 1862, (for rent due 1st of January, 1862,) demanded ground rent due 1st of July, 1862, in August of that year, which being refused, Mr. Myers, (as agent of complainant,) at once went to the record office to find the leases, discovered they were not there, found them at Mr. Thompson's office and immediately demanded their execution, which being refused the bill in this case was filed 8th of September, 1862, and it must be borne in mind that Forbes was in Europe from August, 1861, to September, 1862, and that Myers died in June, 1862. It is submitted that there was no laches on the part of Mr. Myers and his representatives, and that no case can be found in the books where the specific performance of a contract in relation to real estate was refused by a Court of Equity, on the ground of laches under such circumstances as these. On the contrary, at the first moment that Forbes showed to the complainant his true character and designs, the utmost

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haste was used to compel the performance of this contract. *Saunders and Wife vs. Simpson*, 2 *H. & J.*, 81. *Story's Eq. Jurisp.*, *secs.* 747, 748, 775.

4th. It is contended that Forbes is relieved from taking more than one lot, as Myers agreed to execute a lease to Hammill for one lot, and that although no such man ever presented himself to Myers or any of his representatives, and was not produced as a witness by the defendant, and in fact is not shown to exist; and although it must be conceded that Myers could not force Hammill to take the lots, nor could Hammill force Myers' representatives to make a lease to him, yet it is contended Forbes is released. It was clearly *nudum pactum*. Void for want of consideration. Wanting all mutuality. It was merely an act of kindness on the part of Myers, by which he is not legally bound, and of which Forbes, now that he is dead, is seeking to take advantage. *Black vs, Cord*, 2 *H. & J.*, 100. *Tubman vs. Anderson*, 4 *H. & McH.*, 357, *see Opinion of Chancellor*, *p.* 359.

5th. The last objection is that the contract is imperfect or uncertain in not stating the term for which the lease was to continue. Is this so?

"In construing written instruments the first and chief object is to ascertain the meaning of the parties, and the intention as expressed, unless contravening some rule of law, is to be carried into effect." *Williamson et al. vs. Mayor, &c.*, 19 *Md. Rep.*, 416, 417. *Varnum, &c., vs. Thruston*, 17 *Md. Rep.*, 496 *and* 500.

The evidence of Mr. Thompson, the conveyancer of both parties, shows that the contract was perfectly clear and certain to him. He says he prepared "two leases in accordance with the stipulations it contained," such as are usual in the city of Baltimore, that is, for ninety-nine years, and renewable forever. But what is the difference if it be for ninety-nine years, renewable, or for nine hun-

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dred and ninety-nine, or forever. They were, as the contract on its face shows, to be perpetual leases, and the evidence of Mr. Thompson, as an expert, merely shows what is considered a perpetual lease in the city of Baltimore, that is for ninety-nine years, renewable forever, with the covenants usual in such a lease. The contract, however, on its face, clearly contemplates and means a perpetual lease. The rent is fixed at twenty dollars "annually." Forbes to have the right to buy out in three years. The rent payable semi-annually. How could the contract be more specific? In no way unless it contained all the specifications of the lease for which it provides. *Marsh vs. Milligan*, 3 *Jurist, N. S.*, 979. *Great Northern Railway Company vs. Manchester, Sheffield and L. Railway Company*, 5 *De Gex & Smales*, 138. *Sanderson vs. Cockermouth & W. Railway Company*, 11 *Beavan*, 497. *Fry on the Specific Performance of Contracts*, 100 *Law Library, secs.* 204, 54. *Gordon vs. Trevelyan*, 1 *Price*, 64. *Colerick et. al vs. Hooper*, 3 *Indiana*, 316.

Wm. F. Frick for the appellee.

The case may be considered under two aspects:

1st. As it appears on the face of the bill alone.

2nd. As presented on the bill, answer and proofs.

I. It is well settled that the complainant must recover upon the case made by his bill, and that the defendant, although he answers it, may at the hearing object that the case made in the bill does not entitle the party to the relief he asks. *Chambers vs. Chalmers et al.*, 3 *G. & J.*, 438.

The bill is devoid of equity on various grounds:

1. There was no equitable ground on which to enjoin the defendant's collection by law of a debt admitted to be due to him. The defendant contracted to do certain

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work, for which he was to be paid a stipulated price. It is conceded that he did the work, and was entitled under the contract to the sum which the complainant unjustly withheld, and which the defendant sought to recover at law. The alleged contract to lease the lots, though appearing to be made in consideration of the other contract, was a separate and independent agreement, and payment for the work was not made dependent by the terms of any part of either contract upon the acceptance of the leases.

This point is made more clear by the fact shown in evidence, that the complainant finally settled with the defendant on the first contract, and gave his notes for the balance due without requiring execution of the second contract.

2. There is not in the contract itself sought to be enforced, the essential ingredient of mutuality, so as to entitle the party not bound by it to a decree for its specific performance; it was a contract required to be in writing under the statute of frauds, and signed only by Forbes.

There was no legal obligation upon Myers to give the leases or to perform the contract. *Lawrenson vs. Butler*, 1 *Sch. and Lef.*, 18. *See also Armiger vs. Clarke*, *Bunbury*, 111. *Bromley vs. Jeffries*, 2 *Vernon*, 415.

The doctrine in these cases is fully adopted and expounded by Chancellor KENT in *Benedict vs. Lynch*, 1 *Johns. Ch. Rep.*, 373. It is also fully recognized and adopted as the law of this State, in the case of *Geiger vs. Green*, 4 *Gill*, 476. *Also in Duvall vs. Myers*, 2 *Md. Ch. Dec.*, 404, 405.

The complainant's right to relief does not depend upon his subsequent offer to perform the contract on his part, when events may have rendered it advantageous for him to do so, but upon its originally obligatory character. It would not be equity, says Lord REDESDALE, "that a party

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not originally bound by the agreement should be permitted at his option to compel the other party to perform, when, if the advantage was the other way, he could not himself be coerced into performance." *See also Benedict vs. Lynch*, 1 *Johns. Ch. Rep.*, 370. *Beard vs. Linthicum*, 1 *Md. Ch. Dec.*, 350. *Tyson vs. Watts, Id.*, 15–17. *Moore vs. Randolph*, 6 *Leigh*, 175.

3. This is an application for a specific execution of an alleged agreement; in such case it is not only necessary to prove that an agreement was made, but its terms must be so clearly and fully shown that the Court must be certain of carrying into effect the contract made by the parties. *Stoddart vs. Bowie*, 5 *Md. Rep.*, 28. 2 *vol. Story's Eq. Jur., sec.* 767.

It may be added here that no attempt has been made by proofs to explain this document, and it is settled that this could not be done, for the distinction is well established between the right of a defendant resisting specific performance and a complainant seeking it, to go into parol evidence, to aid his case upon a written agreement. See subject treated at large in 2 *White and Tudor's Leading Cases*, 355. *Hare & Wallace's notes to Woollam vs. Hearn*, 2 *Story's Eq. Jur., secs.* 769, 770.

In addition to the other uncertainties and imperfections of the paper, there is one other conclusive objection to a decree for its specific performance, and that is to be found in the fact that it does not specify the term for which the lease is to be made. It stipulates that the rent is to commence 1st of January, 1861, and is to be bought out within three years; but whether the lease is to be for three years, or thirty years, or three hundred years, is not stated, and cannot possibly be made out, except by conjecture and speculation.

The cases on this point are conclusive: *See Fry on Specific Performance of Contracts,* (98 *Law Library, p.* 88,)

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secs. 221, 222. *Clinan vs. Cooke*, 1 *Sch. & Lef.*, 22. *Gordon vs. Trevelyan*, 1 *Price*, 64 *to* 71. *Blore vs. Sutton*, 3 *Merrivale*, 237. *Lord Ormond vs. Anderson*, 2 *Ball & Beatty*, 363. *Cox vs. Middleton*, 2 *Drewry*, 209. *Wheeler vs. D'Esterre*, 2 *Dow*, 359. And see as directly to this point, *Allen vs. Burke*, 2 *Md. Ch. Dec.*, 538. *Parkhurst vs. Van. Courtland*, 1 *Johns. Ch. Rep.*, 273. *Abeal vs. Radcliff*, 13 *Johns. Ch. Rep.*, 299, 300. *Jordan vs. Fay*, 40 *Me. Rep.*, 130. *See also* 5 *Jones' Eq. Rep.*, (*N. C.*) 154.

4. Another objection to the equity of the bill is that, from the nature of the case, the complainant has adequate relief at law. 2 *Story's Eq. Jur.*, *secs.* 717, 742, 746. *Fry on Specific Performance*, p. 34, *sec.* 14, *referring to Clayton vs. Illingworth*, 10 *Hare*, 451.

II. Considering the case on the bill, answer and proofs, these further objections present themselves.

1. The complainant asks for an entire performance of the contract by Forbes; when it is shown that he consented, after the contract was made, to modify it by taking Patrick Hammill for one lot, and actually executed a lease to Hammill accordingly. By this act, the privity of contract between him and Forbes, as to that lot, was extinguished, and could not be afterwards restored without Forbes' consent. The case of *Shaw & Fisher in* 5 *De Gex, McNaughton & Gordon*, p. 596, is directly to this point. *See also Byrns vs. Rowceine*, 2 *Edwards' Ch. Rep.*, 447.

And in the uncertainty in which the record stands as to which lot was leased to Hammill, it would not be possible to designate, by a proper decree, the dimensions of the lot which should be accepted by Forbes, even if the Court, upon the present bill, without amendment, could pass a decree for partial relief.

2. The answer avers, and the proofs show, that when Myers settled with Forbes in May, 1861, he forced him by threats of litigation to vary the contract, and abandon to

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some extent his plain rights thereunder. And that when he compelled and completed this settlement, he took receipts in full from Forbes, under the contract; ignored the leases; made no demand on Forbes to execute them; and let the 1st July, 1861, pass by without making any demand on him, either to pay the rent then due under the contract, or to accept the leases. This conduct on Myers' part, completely justified Forbes in then concluding that Myers had abandoned his claim on him, touching the leasing of the property, and he accordingly cancelled the bargain he had made for building on the lot, and a sale of the improvements, and let the materials lie by until both they and the lot had become depreciated in value. Nearly two years from the making of the contract, and more than a year from the period of the final settlement between them, were allowed to pass before a demand was made to execute the leases. These facts bring the case within that numerous class, wherein relief is denied, because of the *laches* of the complainant, when, as Lord ALVANLY says, "he has not shown himself ready, desirous, prompt and eager for relief," or in the language of Lord CRANWORTH, "he has not sought relief as promptly as the nature of the case will admit." This rule is especially applied to cases where the lapse of time has induced a change of circumstances, to the disadvantage of the defendant. *See Fry on Specific Performance*, (98 *Law Lib.*, 218,) *secs.* 730, 731, 732, 735, 736. *Ead vs. Williams*, 4 *De Gex, McNaughton & Gordon*, 691. *Lloyd vs. Collett*, 4 *Brown's Ch. Rep.*, 469. *Southcomb vs. Bishop of Exeter*, 6 *Hare*, 218. 31 *Eng. Ch. Rep., and notes of Editor in that case.* And especially does this rule apply where the contract is *unilateral.* Any delay in the party in whose favor the contract is binding is looked at with unusual strictness. And that is this case. *Fry on Spec. Performance, sec.*

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733, *p.* 218, *and sec.* 721, *p.* 216. *Benedict vs. Lynch*, 1 *Johns. Ch. Rep*, 373.

BARTOL, J., delivered the opinion of this Court.

The bill in this case was filed by the appellant to compel the specific performance of a contract made by the appellee with the complainant's testator, and also to enjoin the appellee from further proceedings under a *scire facias*, on a mechanic's lien. The contract is in these words:

"I hereby agree to do the carpenter's work on the warehouse about to be built for Charles Myers, on the corner of South street and Exchange Place, at sixty-one *per cent.* off carpenter's full measurement price, the work to be approved of by the architect.

"In consideration of the above contract, I hereby agree to lease of Charles Myers, the following lots, that is, all that lot of ground beginning for the same on the east side of Spring street, at the north-west corner of a two story brick house, said lot belonging to Alexander Lowry, and running thence north-westerly 26 feet, thence easterly parallel with Madison street, 60 feet, thence southerly parallel with Spring street 26 feet, thence westwardly parallel with Madison street 60 feet to the place of beginning. The above to be divided into two lots, and the price to be $20.00 for each lot annually, payable semi-annually on the first days of January and July, the rent to commence on the 1st day of January, 1861—said Forbes to have the privilege of buying out said ground rent within three years, at the rate of six *per cent. per annum.*

"JAMES S. FORBES.

Baltimore, Nov. 28, 1860.

Endorsed:—PATRICK HAMMILL, 1 lot.

Witness:—C. H. MYERS."

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It appears by the proof that the contract for doing the carpenter's work on the warehouse was fully performed by Forbes, the appellee, and after much altercation and dispute between him and Myers, the appellant's testator, with regard to the price of the work, a final settlement of the dispute was made between them on the 28th day of May, 1861, when Myers gave his two notes to Forbes, one for $500, payable the first of October, 1861, and the other for $468.03, at six months, and a receipt was given by Forbes declaring the same to be, "when paid, in full of all demands against Myers for carpenter's work, materials furnished, &c., on the warehouse.

A claim of lien was filed in the Clerk's office by Forbes, and a balance of $403.69 remaining unpaid, a *scire facias* was issued for its collection, and to restrain further proceedings thereon, was one object of the bill in this case.

The equity of the bill rests upon the alleged failure and refusal of the appellant to perform his agreement to lease the lot of ground on Spring street, and the bill prays for a decree requiring a specific performance of the contract to lease.

Objection was taken below to the jurisdiction of the Court, and the Circuit Court, entertaining the opinion that this objection was well taken, on that ground dissolved the injunction and dismissed the bill.

In the opinion of this Court, if the case of the complainant were free from difficulty in other respects, and depended alone on the decision of the question of jurisdiction, the decree of the Circuit Court would have to be reversed.

The case of *Smoot et al. vs. Rea and Andrews*, 19 *Md. Rep.*, 398, *and Mercer vs. Howser*, (see appendix,) decided at the last term, are conclusive of this question.

In our opinion the evidence in the case fails to sustain the defence on the ground either of waiver and abandon-

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ment of the contract on the part of the appellant's testator, or of *laches* and delay as contended for the appellee.

The insuperable difficulty in granting the relief prayed consists, in our opinion, in the want of definiteness and certainty in the terms of the contract sought to be enforced. In such a case, to repeat the language of this Court, in *Stoddert vs. Bowie*, 5 *Md. Rep.*, 28, "it is not only necessary to prove that an agreement was made, but the terms of the agreement must be so clearly and fully shown that the Court can have no difficulty in knowing what the terms are, so as to be certain of carrying into effect the contract made by the parties. Passing a decree for specific execution upon proof short of this, instead of executing the agreement of the parties, would be making one for them, which the Court certainly has no authority to do." See also 2 *Story's Eq. Jur., sec.* 767.

In this case the contract is altogether silent as to the term for which the intended lease was to be made. The term or duration of a lease is an essential part of it, and in the absence of any stipulation in that respect a Court of Equity cannot decree a specific performance of a contract to lease. In *Howard vs. Carpenter*, 11 *Md. Rep.*, 278, it was held that without a stipulation fixing the rent reserved, a contract to lease could not be specifically enforced in equity. But the length of the term is just as necessary a part of a lease as the rate of rent reserved.

In our opinion this defect in the contract has not been removed by anything disclosed in the proof.

Two leases for ninety-nine years, renewable, were prepared by A. W. Thompson, the conveyancer, and signed by Myers and wife, but were not delivered to the appellee; nor does it appear from the testimony that he either directed the leases to be drawn in those terms, or

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that he ever saw them or knew their contents, or that they had been executed by Myers until long afterwards, when, according to the evidence of A. W. Thompson, he remarked "that the drawing of the leases was unauthorized by him."

This witness states that according to his recollection the contract was left with him by Charles Myers, deceased. The witness, Charles H. Myers, states that his father told Forbes to leave the original deed with A. W. Thompson, in order to have the leases drawn. It does not appear, however, that either the original deed or contract was taken to Thompson by Forbes, or that he gave any instructions to Thompson with regard to the preparation of the leases. These seem to have been drawn by Thompson, either by the direction of Myers or without any particular instructions as to the terms; and there is, in our opinion, not such clear and satisfactory evidence to connect the appellee with the preparation and execution of the leases, as to give to those acts the force of a part performance of the agreement, so as to take it out of the operation of the statute of frauds, or to supply the defect in the terms and provisions of the agreement, so that a Court of Equity may decree its specific performance, even if it were possible to supply such a defect in the written paper by parol evidence.

Considering that the agreement sought to be specifically executed in this case is vague, uncertain and indefinite in its terms, and incapable of being specifically enforced, the decree of the Circuit Court must for that reason be affirmed without costs to the appellee.

Decree affirmed.

(Decided May 15th, 1866.)

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AGREEMENT.

1. CONSIDERATION: PAROL PROMISE TO PAY THE PRE-EXISTING DEBT OF ANOTHER: STAT. 29, CHARLES II, SEC. 4: NEW PROMISE. G, a broker, received from the defendant certain moneys to invest in bonds, and being then indebted to the plaintiff gave the latter his check for the amount due him, and deposited with the cashier of his bank five State bonds, to make his checks good. Three of the bonds so deposited had been purchased upon the order and with the money of the defendant, but never delivered to him, yet marked in pencil with his initials. These bonds were transferable by delivery, and neither the bank nor the plaintiff were aware of the defendant's claim to a part of them. After the deposit the bank overpaid checks of G, but did not pay the check given to the plaintiff. G failed a few days after

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AGREEMENT—*Continued.*

depositing the bonds in bank. When the defendant called on him, G told him the bonds were pledged with the bank to secure its overpayment of his checks and the unpaid check to the plaintiff; upon which the plaintiff proposed, if G would give him an order for the five bonds he would make good the amount due on them to the bank, and also pay G's check to the plaintiff, to which G agreed. Upon the presentation to the bank of the orders given under this agreement for the delivery of these bonds, and upon payment of *the sum due the bank*, the bonds deposited were delivered up. After the bonds had been obtained, G and the plaintiff called on the defendant to inquire why the check had not been paid, and the defendant admitted his promise to pay, but said he was too smart to pay that check, and had procured the bonds without paying more than the bank's advances. On a suit brought against the defendant by the plaintiff, HELD:

1st. That it was not necessary, to create an obligation on the part of the defendant to pay the plaintiff the amount of the check, that the consideration should proceed *directly* from the plaintiff or the promise be made directly to him. Such a promise to one for a third party, is to be deemed made to the third party, if adopted by him, although he was not cognisant of it when it was made. *Small vs. Schaefer*, 158.

2nd. That the prejudice of the plaintiff by the delivery of the bonds was a sufficient consideration to support the defendant's promise whether the latter was benefited by the transaction or not. *Id.*, 161.

3rd. That this case was clearly within the well-known exception to the operation of the *statute of frauds*, that "wherever the main purpose and object of the promisor is, not to answer for another but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another." *Id.*, 161.

2. The rule that there must be an extinguishment of the first debt as a consideration of the new promise, applies only to that class of cases where the creditor's relinquishment of the first debt is the motive of the promise. It does not apply to cases where other inducements are held out such as the assignment of property, or relinquishment of liens, in consideration of which the promisor undertakes to pay the debt of another. *Id.*, 162.

AGREEMENT—CONSTRUCTION OF.

See CONTRACT, CONSTRUCTION OF, 1, 2.
PARTNERSHIP, PARTNERS, 1.

ANSWER IN CHANCERY.

See PLEADING IN EQUITY, 1, 2.
PRACTICE IN EQUITY, 1, 2.

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APPEALS.

1. It is well settled that ordinarily no appeal will lie from an order requiring a trustee or receiver to bring money into Court. Such orders rest in the discretion of the Court, and where they determine no right, are not the subject of review on appeal. *Henry et al. vs. Kaufman*, 11.

2. MOTION TO DISMISS: PRACTICE IN COURT OF APPEALS.—Where an agreement to abandon an appeal for a legal and valuable consideration, executed on the part of the appellees, is fully proved to the satisfaction of the appellate Court and not denied by the appellant under oath or attempted to be disproved, there is no alternative but to dismiss the appeal. *Lester vs. Howard et al.*, 236.

3. The appellate Court alone has power to decide when an appeal will lie in any particular case. *Id.*, 236.

4. MARYLAND CODE.—Where execution was issued on the 29th of January, 1861, upon a judgment or decree rendered on the 1st Monday of July, 1860, all proceedings under the latter must be regulated by the Code. *Eakle et al. vs. Smith*, 360, 361.

5. STAY OF EXECUTION.—Under the CODE, ART. 5, SEC. 33, in cases of judgments on which an execution has been issued, "whether the same has been in part executed or not," the filing an appeal bond approved as required, shall stay any execution which has been issued on any such judgment. *Id.*, 361.

6. The appeal *per se* operates no *supersedeas*, whether the execution be issued or not. The defendant who desires to protect himself from the effects of an execution, if he would avoid all risk of delay, must file the appeal bond immediately. But if he is willing to incur the risk, or unable to give bond earlier, he may defer it to the last moment before execution is consummated, provided he has appealed in time. *Id.*, 361.

7. The non-payment of the costs of the execution, does not necessarily destroy the effect of the bond as a stay of execution, this requirement of the law being intended for the protection of the Sheriff, not of the plaintiff. *Id.*, 361.

8. CODE, ART. 5, SEC. 23: EFFECT OF APPEAL FROM ORDER GRANTING AN INJUNCTION.—A case was referred to an arbitrator by consent, under rule of the Court in which the suit was pending. While the matter was still before the arbitrator the defendant obtained an injunction, restraining the plaintiff from proceeding with the reference. The latter filed an answer and took an appeal from the order granting the injunction, and gave bond as required by law. The arbitrator having filed his award during the pendency of the appeal, on exceptions to it for that cause, HELD:

1st. That by the true construction of sec. 23, Art. 5 of the Code, upon appeal taken, and the giving an appeal bond, the opera-

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APPEALS—*Continued.*

tion and effect of the injunction entirely ceases until judgment shall be pronounced by the appellate tribunal. *Nor. Cent. Railway Co. vs. Canton Co. of Balto.*, 506, 507.

2nd. That the arbitrator was not prevented by the pendency of the injunction case from going on with his award. *Id.*, 502, 503, 507.

See BASTARDY, 4.

PRACTICE IN COURT OF APPEALS, 2, 3, 4.

ARBITRATION AND AWARD.

1. AMENDMENT OF PLEADINGS: JURISDICTION IN EJECTMENT: PRACTICE IN COURT OF APPEALS.—The Declaration in Ejectment described certain lands sued for as "*lying in the City of Baltimore.*" By order of the Superior Court of Baltimore City, where the action was instituted, the cause was referred to an arbitrator, who rendered his award in favor of the plaintiff, for "the lot of ground in the declaration aforesaid mentioned, situated and lying partly in the City of Baltimore and partly in Baltimore County," &c., &c., "beginning at the intersection of the South side of Sixth Avenue with the west side of Clinton street, as laid down on the plan of the harbor of Baltimore in connection with the Canton Company's lands, compiled by William Dawson, and published in the year 1853, and running thence," &c. On appeal by the defendant, besides the exceptions taken in the Court below, the appellant contended that there was a want of identity between the land claimed in the *nar*, and the land in the award; that there was want of certainty in the award; and that the *nar* was defective in not stating whether the greater portion of the land sued for lay in the city or in the county, or where the defendant resided, so as to show whether the Court had jurisdiction under the provisions of sec. 46, Art. 75 of the Code. HELD:

1st. That if in the prosecution of this case in Court, the defendant had objected to its jurisdiction that it did not affirmatively appear in the plaintiff's *nar*, that the greater part of the land was within the city of Baltimore, the Court could have allowed an amendment of the pleadings. Failing to avail itself of this defect, it would have been too late after verdict, as every reasonable intendment would be made to support it. And such an intendment will apply with equal or greater force to support an award. *Nor. Cent. Railway Co. vs. Canton. Co. of Balto.*, 499.

2nd. That there is no want of identity between the land claimed in the *nar* and that set out in the award. *Id.*, 499.

3rd. That the land is sufficiently described in the award. *Id.*, 499.

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ARBITRATION AND AWARD—*Continued.*

2. When an award is made on a case referred, under the 7th Article of the Code, no objections can be ordinarily made to it, except such as are specified in the 2nd section of the above Article, or to such legal objections as appear on the face of the award. *Id.*, 506.

3. ———: CODE, ART. 5, SEC. 23: EFFECT OF APPEAL FROM ORDER GRANTING AN INJUNCTION.—A case was referred to an arbitrator by consent, under rule of the Court in which the suit was pending. While the matter was still before the arbitrator the defendant obtained an injunction, restraining the plaintiff from proceeding with the reference. The latter filed an answer and took an appeal from the order granting the injunction, and gave bond as required by law. The arbitrator having filed his award during the pendency of the appeal, on exceptions to it for that cause, HELD:

1st That by the true construction of sec. 23, Art. 5 of the Code, upon appeal taken, and the giving an appeal bond, the operation and effect of the injunction entirely ceases until judgment shall be pronounced by the appellate tribunal. *Id.*, 506, 507.

2nd. That the arbitrator was not prevented by the pendency of the injunction case from going on with his award. *Id.*, 502, 503, 507.

ASSIGNMENT, ASSIGNOR, ASSIGNEE.

1. ASSIGNMENT OF CHOSES IN ACTION.—The assignment carried the rights of the assignor in and to certain real estate which he had conveyed absolutely to a mortgagee, but the conveyance by private understanding between him and the mortgagee was to be treated as a mortgage, and the latter in fraud of said agreement had sold the property to a third person, and the assignee of the stock sought to have this fraudulent sale accounted for so as to further reduce the amount due upon the stock, HELD:

1st. That these matters of the assignment are not to be regarded as unmixed choses in action for the payment of money within the meaning of the Act of 1829, ch. 51. *Banks vs. McClellan*, 80.

2nd. That as assignee of the mortgagor's rights in reference to the real estate, if the transaction in relation to it between the assignor and the defendant was intended merely as a security for a loan, the complainant can resort to a Court of Equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property upon payment of the amount properly due; or if the property has passed beyond her reach, and the mortgage be overpaid, for a decree ordering an account and repayment of the difference. *Id.*, 81.

See MORTGAGE, 8.

PARTNERSHIP, &c., 1.

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ATTACHMENT.

1. Debtor and Creditor: Fraudulent Conveyance.—The plaintiffs laid an attachment in the hands of a garnishee on the 21st of January, 1860. On the 20th of the same month the defendant had conveyed his interest in a vessel by bill of sale in trust for certain of his creditors, but the trustees did nothing towards the execution of the trust. On the 24th of September, 1859, the defendant had contracted to convey his interest in the vessel to the garnishee for a certain sum, and on the same day made a bill of sale to him of the vessel, under which no title passed, because it was not recorded in conformity with the Act of Congress. By the terms of sale the purchase money was to be paid, not to the defendant, but to the payment of certain debts due by him, one of which was due to the garnishee himself. And evidence was offered to show that the interest of the defendant in the vessel was to be held as collateral security for the payment of this debt, and to indemnify him for the payment of other debts due by the defendant on account of the vessel, which the garnishee assumed to pay, and did pay out of the purchase money. Upon the repayment of these sums to the garnishee by the defendant, the interest of the latter in the vessel was to be reconveyed to him by the garnishee. At the trial of the attachment case, Held:

   1st. That the effort on the part of plaintiffs to show fraud on the part of the defendant, because of the bill of sale and the deed of trust, even if sustained, would not avail them, as there was no evidence to show that if the defendant meditated a fraud upon his creditors the garnishee had notice of it, without which he could not be affected by it. *Troxall et al. vs. Applegarth, Garn. of Dunnock*, 181, 182.

   2nd. That as the plaintiffs had not laid the attachment upon the vessel, but upon the proceeds of sale, they could not sustain their attachment without conceding the sale to and possession of the garnishee. *Id.*, 181.

   3rd. That there was evidence to go to the jury to prove that at the time the vessel was sold and delivered to the garnishee, there was a *bona fide* agreement between the defendant and the garnishee, that the latter should, in consideration of the price agreed on, pay certain debts due by the defendant, which were designated by him, amounting in the aggregate to the whole purchase money, and that this agreement was performed by the garnishee, and if the jury so found, this was a good defence to the attachment. *Id.*, 182.

   4th. That in this view of the case it was immaterial whether the bill of sale was under the Act of Congress ineffectual to pass the legal title as against the garnishee, as the agreement would

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ATTACHMENT—*Continued.*

be binding upon the defendant and protect the fund from attachment by his creditors. *Id.*, 182, 183.

5th. That as the attachment was laid on the fund in the hands of the garnishee, the right of the plaintiffs to recover must necessarily depend upon the state of the accounts between the defendant and the garnishee, and the effect of the agreement between them at the time the attachment was laid. *Id.*, 183.

2. ATTACHMENT ON WARRANT: MOTION TO STRIKE OUT JUDGMENT NISI AND TO QUASH ATTACHMENT: IGNORANCE OF GARNISHEES: FRAUD, DECEIT AND IRREGULARITY: ACCOUNT, WHEN TO BE FILED: RETURN OF SHERIFF AS TO AMOUNT LAID: INQUISITION UNNECESSARY.—In a case of attachment on warrant laid in the hands of S., F. & Co., the defendants being returned *non est*, and the garnishees having failed to appear, a judgment of condemnation *nisi* was entered against the latter. After judgment the garnishees appeared and moved that the same be stricken out and set aside "for fraud, deceit and surprise and irregularity in obtaining the same," and subsequently moved, "to quash the attachment because the accounts on which the defendants are alleged to be indebted to the plaintiffs, were not produced and filed with the affidavits made by the plaintiffs before the Justice who issued the warrant of attachment, HELD:

1st. That ignorance on the part of the garnishees of the necessity of appearing in Court and contesting the attachment affords no sufficient ground for striking out the judgment. *Friedenrich et al., Garn., vs. Moore et al., use of Campbell*, 307.

2nd. That to justify the striking out of the judgment it would be necessary that clear and convincing proof should be given that the garnishees were prevented from making their defence by deceit practiced upon them by the plaintiffs, lulling them into the belief that the attachment had been or would be abandoned. *Id.*, 307, 308.

3rd. That it is immaterial whether the account which was produced was obnoxious to the objection urged against it by the garnishees or not, as the objection was not made in time. *Id.*, 308, 309.

4th. That the return of the Sheriff that he had laid the attachment in the hands of the garnishees, &c., without stating to what amount, is sufficient, the garnishees having been informed by the service of the writ what was the amount of the plaintiffs' account. *Id.*, 309.

5th. That it is not usual or necessary for the Sheriff to state in his return for what amount he has laid the attachment in the garnishees' hands, although that form has sometimes been observed. *Id.*, 309.

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ATTACHMENT—*Continued.*

6th. That a failure of the garnishees to appear, entitled the plaintiffs to the judgment *nisi*, which in such a case is a motion of course, and no inquisition is necessary. *Id.*, 309.

BALTIMORE CITY.

See MORTGAGE SALES IN BALTIMORE CITY.

BASTARDY.

1. SCIRE FACIAS: RECOGNIZANCE, &C.: RECEIPT OF MOTHER—HOW FAR A DISCHARGE OF THE OBLIGATIONS OF THE PUTATIVE FATHER.—In a proceeding under the CODE, ARTICLE 13, SECTION 7, &c., in relation to bastardy, until the recognizance has been given and the order of the Justice has been passed thereon, fixing the sum to be paid by the putative father for the maintenance of the child, the mother of the child may accept from him any sum she may consider adequate compensation for its past maintenance; and if paid in good faith he would be discharged from his obligation for the period embraced in the settlement. *Barber et al. vs. State use of Haller*, 391.

2. ——: ——: RECEIPT OF THE MOTHER INOPERATIVE TO DISCHARGE THE PUTATIVE FATHER FROM LIABILITY FOR THE FUTURE MAINTENANCE OF THE CHILD.—Where a receipt for money paid as above, in terms purports to discharge the putative father from liability for the future maintenance of the child, in that respect it would be wholly inoperative, as plainly against the policy of the law. *Id.*, 392.

3. RECOGNIZANCE, OBJECT OF IT: CONUSOR NOT RELIEVED FROM OBLIGATION TO THE COUNTY BY AGREEMENT WITH OTHERS.—The recognizance creates an obligation to indemnify the county by providing security for the maintenance of the child, from which the conusor cannot relieve himself by any agreement he may make with other persons. *Id.*, 392.

4. PLEADING: DEMURRER: PRACTICE: JUDGMENT FINAL—ERRONEOUS ENTRY OF: PROCEDENDO.—The defendant pleaded seven pleas to the *scire facias*, to the 1st, 2d, 3rd, 4th and 6th of which the plaintiff demurred, and traversed the 5th and 7th. The Court below ruled in favor of the plaintiff on the demurrers, and thereupon rendered final judgment against the defendants, while it does not appear that the 5th and 7th pleas were withdrawn or abandoned, and the issues of fact thereon were not tried or determined. On appeal, HELD:

That the final judgment was erroneously entered, and must be reversed and the cause remanded upon *procedendo*, *Id.*, 393.

BILL OF DISCOVERY.

See DISCOVERY, BILL OF.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. PAYMENT BY MISTAKE: NEGLIGENCE.—H. & Co., of New York, drew a draft on L. & Co., of Baltimore, and sold it to a bank in New York, which sent it to its correspondent, a bank in Baltimore, for collection. By the negligence of the bank in Baltimore, the draft was

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not collected, and L. & Co., having failed in business, it was protested and returned to the bank in New York, which notified the fact of the dishonor to H. & Co., who, in ignorance of the fact of negligence, paid the amount of the draft. On a suit brought by the bank in New York for the use of H. & Co., against the bank in Baltimore, HELD:

1st. That the payment by H. & Co. being made in mistake, conferred no benefit on the plaintiff, and could not operate for the advantage of the defendant, in the way of discharging or suspending its anterior liability to the plaintiff. *Merchants' Bank of Baltimore vs. Bank of Commerce use of Hoffman*, 52.

2nd. That as the amount of the draft was paid by H. & Co. under a mistake that entitled them to a return of the money, the plaintiff must be regarded as having received it for their use, and as holding it subject to their order. In legal contemplation the payment was a deposit, for which the plaintiff must account, and which, instead of suspending or discharging the defendant from its existing liability to the plaintiff, charges the plaintiff with one of an entirely different character to H. & Co. *Id.*, 52.

3rd. Nor was it essential to the plaintiff's right to recover, that the jury should find that the draft was returned to the defendant. The claim asserted here is not upon the draft, but one sounding in damages for the loss caused by the defendant's negligence and consequent failure to collect it. *Id.*, 52.

2. PROMISSORY NOTES: PRESENTMENT, DEMAND AND NOTICE.—The obligation to make a presentment and demand of payment of the maker of a note extends to the case of a resident within the State (if known to the holder) as well as to a resident of a city. *Staylor vs. Ball & Williams*, 197.

3. A personal demand and personal notice being dependent upon the knowledge of the holder of the place of residence or business of the maker and endorser, the Court correctly refused to grant prayers which required a demand of payment of the maker at his residence or place of business, and personal notice of non-payment to the endorser, or notice at his place of business without regard to the fact whether the holder or Notary had knowledge of the residence of the maker or endorser respectively, or used due diligence to ascertain the same. *Id.*, 197.

4. ——: —— WAIVER OF NOTICE is often more certainly indicated by acts than by words. *Id.*, 197.

5. EVIDENCE: NOTARY'S CERTIFICATE OF PROTEST.—By the Code, Art. 14, sections 6 and 7, the protest itself is *prima facie* evidence of the facts stated therein. *Id.*, 197.

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BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

6. EVIDENCE: PROVINCE OF COURT AND JURY.—What constitutes due diligence upon any state of facts agreed on, or to be proved by the jury, is a question of law for the Court. *Id.*, 199.
7. NOTICE TO ENDORSER.—An endorser is entitled to strict notice, by which is meant that reasonable diligence shall be employed and reasonable efforts made to give it. *Id.*, 199.
8. The Notary must resort to all proper parties to the note within his reach; he must apply to the maker of the note if he is known and within reach. *Id.*, 199.
9. PROVINCE OF COURT AND JURY.—The question of due diligence in this State must be determined by the Court. *Id.*, 201.

See PRACTICE IN EQUITY, 1, 2.

BORROWED MONEY.

See COMMERCIAL TERMS, 1.

CHOSES IN ACTION.

See ASSIGNMENT, &C., 1.

CHRISTIAN SOCIETIES OR CONGREGATIONS.

1. INCORPORATION OF CHRISTIAN SOCIETIES OR CONGREGATIONS UNDER ACT OF 1802, ch. 111.—Where a Christian society or congregation incorporates itself under the Act of 1802, ch. 111, the persons elected under the articles of incorporation, constitute a body politic, and as such act as trustees holding the estate in perpetual succession, and to manage the same in the most upright and careful manner, according to the discipline of the Church with which they are connected. *Tartar et al. Trustees vs. Gibbs et al.*, 335, 336.
2. The male members of the Church are invested with no visitorial or controlling power over the minister or trustees, or interest in the property of the corporation, or with any authority except in the case of selling or leasing, or in amending the articles, when the consent of two-thirds is required. *Id.*, 336.
3. CORPORATIONS, HOW TO BE SUED.—The corporation so formed can only be sued in its corporate name; and a suit against the trustees individually, designating them as trustees of the corporation, omitting part of the corporate name is not a suit against the corporate body, the designation superadded being merely a "*descriptio personæ.*" *Id.* 336.
4. Where the legal capacities of persons are different, such capacities must be considered as if they were several persons. *Id.*, 337.
5. DIVINE WORSHIP: CHURCH MUSIC.—Singing is recognized as a part of Divine worship among almost all denominations of Christians. Whether it should or should not be accompanied with instrumental music, must be determined by those who administer the discipline of the Church to which they belong. *Id.*, 338.

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CHRISTIAN SOCIETIES OR CONGREGATIONS—*Continued.*

6. INTRUSION: MANDAMUS: INJUNCTION.—If the trustees of a Church have intruded upon the office or duties of the minister or stewards of the Church, it is no ground for interposition by injunction at the instance of the male members of the congregation, but the remedy is by mandamus at the relation of the officer disturbed or ousted. *Id.*, 338, 339.

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CODE—CONSTRUCTION OF—*Continued.*

MORTGAGE SALES IN BALTIMORE CITY.
RAIL ROAD COMPANIES—LIABILITIES OF.

COMMERCIAL TERMS.

1. CONSTRUCTION OF THE WORDS "DOUBTFUL CREDIT:" TRIAL OF FACTS.—The words "*Doubtful Credit*" are very comprehensive, and when used without words of limitation or qualification, are understood to mean reputation or standing in the community, as distinguished from the estimate of particular individuals; and in that sense the doubtful credit of a party, when found, is a fact of which persons presumptively have knowledge, without other proof of knowledge. *Merchants' Bank of Baltimore vs. Bank of Commerce use of Hoffman*, 54.

2. EVIDENCE: USAGE: MEANING OF THE TERM BORROWED MONEY: ADMISSIBILITY OF PAROL EVIDENCE TO AID IN THE CONSTRUCTION OF DEEDS.—A deed of composition with creditors contained a provision for the payment of "all borrowed money and accommodation notes, and then all notes which were originally given in the course of business, and have been extended by the holders thereof," &c. On exceptions taken to the claim of a creditor allowed as if *borrowed money*, upon the ground that it was not "borrowed money" within the terms of this deed, HELD:

1st. That the words "all borrowed money" include, in ordinary popular sense, all sums of money loaned by a creditor to a debtor, without regard to the mode, or the existence of any security or evidence of indebtedness. And there being nothing in the context to limit the meaning of the words, it was incumbent on the exceptant to establish by clear satisfactory proof, that the terms used have acquired and were used in a technical or peculiar sense. *Murray et al. vs. Spencer*, 524.

2nd. An usage to be admissible must be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform. *Id.*, 524, 525.

3rd. These principles apply as well to the admission of parol proof by the Court in aid of the interpretation of a deed, as to the admission of such proof when offered to establish the meaning of a contract, to be submitted under the directions of the Court to a jury. *Id.*, 525.

4th. Where a debtor executes a deed of composition with his creditors, the discussions among the creditors, and their impressions about the claim of one of the creditors, before accepting the deed, and afterwards cannot be allowed to control its interpretation and construction, in the absence of all charges of fraud in procuring the composition. *Id.*, 526.

COMMON CARRIERS.

See RAILROAD COMPANIES, &c.

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COMPOUND INTEREST.

See USURY, 1 to 6.

COMPROMISE—DEBTOR AND CREDITOR.

See FRAUDULENT SETTLEMENT, &c., 1.

CONSIDERATION.

See AGREEMENT, 1, 2.

CONSIGNOR AND CONSIGNEE.

CONSIGNOR AND CONSIGNEE.—A factor who receives goods on consignment without any limit as to time, mode or rate of sale, and makes advances or incurs liabilities on account of the goods consigned, thereby acquires a special property in them, and a right to sell, according to the usual course of his duty, so much thereof as may be necessary to reimburse such advances or meet such liabilities. And the consignor has no right by any order given after the advances have been made or liabilities incurred, to control this right of sale, except so far as relates to the surplus of the goods not necessary for the reimbursement of such advances or liabilities, unless he stands ready and offers to reimburse the advances or liabilities. *Whitney vs. Wyman et al., Garn. of Ripka & Co.*, 141, 142.

CONSTITUTION OF MARYLAND 1851.

General reference to, 207, 209, 213.

Art. 4, sec. 1. Judicial power, how vested, 557.

Art. 4, sec. 19. Justices of the Peace—their election and term of office.

Art. 10, sec. 8. Appointment of Adjutant General, 211.

CONSTITUTION OF MARYLAND OF 1864.

Art. 2, sec. 13. Executive Department—Appointments, 204.

Art. 2, sec. 14. Same—During recess of General Assembly, 204, 206, 207.

Art. 2, sec. 15. Same—Persons rejected by Senate not to be appointed during recess, 212.

Art. 2, sec. 16. Same—Time of nomination—Term of office, 202, 204, 205, 206, 208, 210.

Art. 4, sec. 27. Circuit Judges continued in office, 209.

Art. 4, secs. 47 and 48. Justices of the Peace, appointment, term of office, &c., 204, 205, 210, 212.

Art. 4, sec. 47. Same, 202, 208.

Art. 9, sec. 3. Appointment of Adjutant General, 212.

Art. 12, sec. 6. All officers continued until successors qualify, 202, 203, 205, 206, 209.

CONSTITUTIONAL LAW.

1. APPOINTMENT AND REMOVAL OF OFFICERS: CONSTITUTIONAL LAW: JUSTICES OF THE PEACE.—By the Constitution of 1864, Art. 2, sec. 16, it is provided that "All civil officers appointed by the Governor and Senate shall be nominated to the Senate within fifty days from the commencement of each regular session of the General Assembly;

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CONSTITUTIONAL LAW—*Continued.*

and their term of office, except in cases otherwise provided for in this Constitution, shall commence on the first Monday of May next ensuing their appointment, and continue for two years (unless sooner removed from office) and until their successors respectively qualify according to law." By Art. 12, sec. 6, it is provided that "All officers, civil and military, now holding office, whether by election or appointment, under the State, shall continue to hold and exercise their offices according to their present tenure, unless otherwise provided in this Constitution, until they shall be superseded according to its provisions, and until their successors are duly qualified." By Art. 6, sec. 47, the term of office of Justice of the Peace was changed from an election by the people, to appointment by the Governor, by and with the advice and consent of the Senate, HELD:

That Justices of the Peace who were elected in November, 1863, and in office when the Constitution of 1864 was adopted, continue to hold their offices until there shall be regular appointments by the Governor and Senate superseding them; and that the concurrent act of the Senate could only be had at a regular and not a special session of the Legislature. *Taylor vs. Hebden*, 212, 213, 214.

CONTRACT—CONSTRUCTION OF.

1. LANDLORD AND TENANT: LEASE SURRENDER OF.—J. F. W. executed on the 19th day of August, 1856, to J. W. P., a lease of his farm for four years from the 1st of January, 1857, reserving as rent one-half of all the grain raised on the farm, deducting seed wheat; also one-half of the potatoes, if more than five bushels are planted; also, one-half of the apples each year; and the tenant bound himself to sow one field in clover each year during the term. In the spring of 1857, J. F W. planted one field of twenty-five acres in peach trees, which in 1857 and 1858 was cultivated in corn. This field becoming yearly less productive from the growth of the trees, in January, 1859, the said J. F. W. agreed to lease the same to the said J. W. P. for one year, the latter agreeing to furnish for said field two tons of Peruvian guano, and to work the same faithfully, in consideration whereof the former agreed that the latter should take therefrom eight hundred bushels of corn. The latter having assigned his interest in said lease and crop for the year 1859 to J. W. H, who recieved therefrom eight hundred bushels of corn, and also gathered and sold therefrom a crop of peaches, and received the money therefor. J. F. W. having in the meantime died, his heirs-at-law brought suit against J. W. H. to recover the value of the peach crop, HELD:

1st. That the relation of landlord and tenant as to the peach orchard field continued, notwithstanding the subsequent agreement. That under the stipulations and reservations of said lease, the tenant was entitled to the crop of peaches, and that his right

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CONTRACT—CONSTRUCTION OF—*Continued.*

thereto was in no way impaired by the subsequent agreement. *Hurtt vs. Woodland*, 415, 416, 417.

2d. That the execution of the agreement cannot be considered a surrender of the lease. *Id.*, 417.

2. PRAYERS AND INSTRUCTIONS BY THE COURT : FRAUD.—The defendant's prayer in said action, after reciting the evidence in the cause, asked an instruction that the facts were proper for the jury to consider as "evidence tending to prove fraud" by J. F. W. on J. W. P., Held : That the instruction was calculated to mislead the jury, who might have well supposed that the Court was instructing them as to the *sufficiency in fact* of the evidence to prove the alleged fraud. *Id.*, 417.

3. PRINCIPAL AND AGENT.—The law is well settled, that the principal is personally responsible in all cases of contracts made by an agent within the scope of his authority; and this is not varied by the fact that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit was given to the agent. *York Co. Bank of Pa. vs. Stein et al.*, 463.

4. The circumstance, that the name of the principal was not disclosed at the time of the contract, does not determine the election of the plaintiff to look to the agent alone for the fulfillment of the contract. The principal is notwithstanding answerable when discovered. *Id.*, 463.

5. And such is the law with regard to a plaintiff principal who contracts by an agent. If the agent contracts in his own name without disclosing the principal, either the agent or the principal may sue upon the contract ; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the principal as if the agent had been the contracting party. *Id.*, 464.

6. In all cases of contracts by agents without disclosing their principals, the Courts in affording remedies will look to the substantial parties in interest, in order to avoid circuity of actions ; saving however to the defendant any rights which he may justly acquire as against the plaintiff by the course of dealing anterior to the disclosure, either with the agent of the plaintiff or his own agent. *Id.*, 464.

7. The principal will not be made personally liable if in the intermediate time he has settled with his agent without any suspicion of his own personal liability, or if he would otherwise, without any default on his own part be prejudiced by being made personally liable. *Id.*, 465.

8. In such cases it is essential that the plaintiff should in some way have either deceived the principal or induced him to alter his position and account towards his agent before he is deprived of his remedy against the principal. *Id.*, 465.

9. It is now settled that the simple fact that the principal has paid his agent the funds with which to pay the plaintiff, does not deprive the plaintiff of his right to look to the principal if the agent fail to pay over according to his orders. *Id.*, 465.

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CONTRACT—CONSTRUCTION OF—*Continued.*

10. ———: PROVINCE OF COURT AND JURY.—In an action at law where the question of agency is involved, if there is evidence to establish such agency, the jury are the exclusive judges of its weight. *Id.*, 466.

CONTRACT, SPECIFIC PERFORMANCE OF.

1. SPECIFIC PERFORMANCE OF CONTRACT.—The term or duration of a lease is an essential part of it, and in the absence of any stipulation in that respect, a Court of Equity cannot decree a specific performance of a contract to lease. *Myers vs. Forbes*, 611.

2. *Quaere?* Whether it is possible to supply such a defect in the written paper by parol evidence? *Id.*, 611.

CONTRIBUTION.

CORPORATIONS, 1 to 6.

CORPORATIONS.

1. CORPORATIONS: INDIVIDUAL LIABILITY OF STOCKHOLDERS UNDER THE ACT OF 1852, CH. 338, SEC. 9: RECOUPMENT: PRACTICE IN EQUITY: CONTRIBUTION.—A company was incorporated under the provisions of the Act of 1852, Ch. 338, the 9th section of which provides, that the stockholders "shall be severally and individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, one-half thereof in one year, and the other half thereof within two years from and after the incorporation of said company, or such corporation shall be dissolved." On a bill filed by creditors of the company to make certain of the stockholders liable under this clause, the latter, besides a general denial of liability, sought to set off the amount of certain loans made by them to the company, against the claims of the creditors, HELD:

1st. That though the doctrine of recoupment might properly arise between the company claiming the payment for stock subscribed, and the stockholders who had loaned money to the company, to an amount equal to their stock, or had paid debts of the company to that amount, it by no means follows, that the stockholders are absolved from liability to the creditors of the company. *Matthews et al. vs. Albert et al.*, 535

2nd. The statute does not refer to them in their corporate capacity, but as individual stockholders; and it declares their liability without reference to the amount they may have paid in on their stock. *Id.*, 535, 536.

3rd. If the stockholders had paid for their stock, and *subsequently* became creditors of the company to an amount equal to their stock, by so doing they would be clothed with equities equal to any other creditors who may have become so by contracts with the company. *Id.*, 536.

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CORPORATIONS—*Continued.*

4th. That the stockholders were not liable for debts contracted by the company subsequent to their parting with their stock. *Id.*, 536.

5th. That a creditor of the company who receives stock from the company as collateral security for his loan, is not personally subject to any liability as stockholder, but is protected by the provision of the 13th section of the Act of 1852, Ch. 338. *Id.*, 537.

6th. That this proceeding being in equity, where the liability of the several defendants may be ascertained and enforced with respect to each other, each of them may insist upon contribution from the others, and such other of the stockholders as are liable under the statute should be made to contribute rateably their proportion of the complainants' claims. *Id.*, 538.

2. CORPORATIONS, SUBSCRIPTIONS TO STOCK OF, PRIOR AND SUBSEQUENT TO ORGANIZATION: PRESUMPTIONS: WAIVER: PRINCIPAL AND AGENT: ACTIONS BY AND AGAINST CORPORATIONS.—A Rail Road Company was incorporated by Act of Assembly, with a clause prescribing certain preliminaries to be observed in opening the books and taking subscriptions for stock; among others, that "upon every such subscription there shall be paid at the time of subscribing, to the said Commissioners, or to their agents appointed to receive such subscription, the sum of one dollar on every share subscribed." Books were opened by the Commissioners, the requisite number of shares subscribed, a Board of Directors and President were elected, and the Company fully organized. After this organization the defendant subscribed for ten shares, in one of the subscription books, upon the terms and conditions prescribed therein and in the charter, with this condition annexed: "Provided the said contemplated road should be built on the then present track of the existing branch to 'Green Spring' of the B. & S. R. R.," but did not pay the sum of one dollar per share required by the charter to be paid to the Commissioners at the time of subscribing. In an action brought by the Company to recover the amount of the calls on the defendant's subscriptions to the stock, HELD:

1st. That the preponderance of authority in favor of a strict compliance with the provisions of the charter, in cases of subscription *prior to the organization of the Company*, is such as is not to be disregarded. *Taggart vs. Western Md. R. R. Co.*, 593.

2nd. There is no doubt that, in general, a strict compliance must be shown with the provisions of the charter, but in some cases a compliance will be presumed and in others it may be waived. *Id.* 593.

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CORPORATIONS—*Continued.*

3d. The distinction between subscriptions prior and subsequent to organization is clearly recognized in this State. *Id.*, 593, 594.

4th. In this case, the corporation being organized by the subscription of the necessary proportion of the stock and election of officers, succeeded to the powers previously vested in the Commissioners, to sell and dispose of the remaining shares, without regard to the conditions imposed on them. *Id.*, 594.

5th. The act of the agent taking the subscription being recognized by the corporation, by receiving and registering the subscription among the conditional subscriptions, was equivalent to a previous appointment of the agent for that purpose. *Id.*, 594.

6th. A conditional subscription to stock is a continuing offer, which is final and absolute when accepted. *Id.*, 595.

7th. All contracts for stock made *subsequent* to the formation of the Company, in consideration of a particular location, when complied with by the Company, will be as binding on both parties as if the contract had been absolute and unconditional. *Id.*, 596.

8th. Non-compliance with the provisions of a charter is not a matter of defence, collaterally, between corporations and their stockholders or debtors. *Id.*, 596.

9th. The modifications of a charter, in enlarging the time of commencing and completing the work, is one of those incidents to all charters which comes within the constitutional power of the State to exercise, and with due notice of which all its citizens must be presumed to contract. *Id.*, 596, 597.

8. STATUTE OF LIMITATIONS.—Subscriptions to the stock of a rail road company were made on the 28th of April, 1853, conditional upon the adoption by the company of a particular route. This route was adopted by the company on the 31st of March, 1857. No calls were made for the payment of subscriptions until the 25th of June following. In an action by the company to recover the amount of the calls upon the stock subscribed for, HELD:

That the statute of limitations did not begin to run until the several calls were due. *Id.*, 597.

See CHRISTIAN SOCIETIES, &c., 1 to 6.
GUARDIAN'S BOND, &c., 1 to 6.

COVENANTS, REAL AND PERSONAL.

See MORTGAGE, &c., 8.

CRIMES AND PUNISHMENTS.

See JUSTICE OF THE PEACE, 2.

CUMULATIVE REMEDY.

See GUARDIAN'S BOND, &c., 3.

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DAMAGES—MEASURE OF.

See GUARDIAN'S BOND, &c., 2 to 6.
INJUNCTION BOND, &c., 4.
PRINCIPAL AND AGENT, 3.
RAIL ROAD COMPANIES, &c., 1—6, and 2, 3, 4, 6, 8.

DAMAGES—PUNITIVE AND EXEMPLARY.

See RAIL ROAD COMPANIES, &c., 3.

DEBTOR AND CREDITOR.

1. COMPROMISE WITH CREDITORS PROCURED THROUGH FRAUD.—Where a debtor, having assets sufficient to pay all his debts, makes a false and fraudulent misstatement of his assets to his creditors, and thereby procures a settlement with them, by which they agree to accept his notes for fifty cents in the dollar on their claims, and surrender original notes and execute a release of all their claims on his paying the compromise notes,—a Court of Equity, on proof of the fraud, will set aside the settlement, and apply the property withheld from his creditors to the payment of the balance of their claims. *Jackson et al. vs. Hodges et al.*, 490, 491.

2. ——: THE STATUTE OF LIMITATIONS will not begin to run in such a case, until the fraud has been discovered or becomes known to the complainants. *Id.*, 491.

See AGREEMENT, 1, 2.
ASSIGNMENT, &c.
ATTACHMENT, 1, 2.
BILLS OF EXCHANGE AND PROMISSORY NOTES.
CORPORATIONS, 1.
FRAUDULENT SETTLEMENT, &c., 1, 2.
INJUNCTION BOND, &c., 4.
LIMITATIONS, 1, 2, 3.
MORTGAGE, MORTGAGOR, MORTGAGEE, 1 to 8.
MORTGAGE SALES IN BALTIMORE CITY, 1 to 11.
USURY, 1 to 6.

DECREE FOR SALE OF REAL ESTATE—OBJECTIONS TO.

See MORTGAGE SALES IN BALTIMORE CITY, 1 to 8.
PRACTICE IN EQUITY.

DEEDS—CONSTRUCTION OF.

See EVIDENCE, 12.

DEED—FRAUDULENT.

See ATTACHMENT, 1—1st to 4th.

DEED OF TRUST.

See PARTNERSHIP, &c,

DEMAND AND NOTICE.

See BILLS OF EXCHANGE, &c., 2 to 9.

DEMURRER.

See BASTARDY, 4.

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DILIGENCE.

See NEGLIGENCE.

BILLS OF EXCHANGE, &c.

DISCOVERY—BILL OF.

See PLEADING IN EQUITY, 1, 2.

DOUBTFUL CREDIT.

See COMMERCIAL TERMS, 1.

EJECTMENT.

1. AMENDMENT OF PLEADINGS: JURISDICTION IN EJECTMENT: ARBITRATION AND AWARD: PRACTICE IN COURT OF APPEALS.—The Declaration in Ejectment described certain lands sued for as *"lying in the city of Baltimore."* By order of the Superior Court of Baltimore City, where the action was instituted, the cause was referred to an arbitrator, who rendered his award in favor of the plaintiff, for "the lot of ground *in the declaration aforesaid mentioned*, situated and lying *partly in the city of Baltimore and partly in Baltimore county*," &c., &c., "beginning at the intersection of the south side of Sixth avenue with the west side of Clinton street, as laid down on the plan of the harbor of Baltimore in connection with the Canton Company's lands, compiled by William Dawson, and published in the year 1853, and running thence," &c. On appeal by the defendant, besides the exceptions taken in the Court below, the appellant contended that there was a want of identity between the land claimed in the nar, and the land in the award; that there was want of certainty in the award; and that the nar was defective in not stating whether the greater portion of the land sued for lay in the city or in the county, or where the defendant resided, so as to show whether the Court had jurisdiction under the provisions of *sec.* 46, *Article* 75 *of the Code*, HELD:

1st. That if in the prosecution of this case *in Court*, the defendant had objected to its jurisdiction, that it did not affirmatively appear in the plaintiff's *nar*, that the greater part of the land was within the city of Baltimore, the Court could have allowed an amendment of the pleadings. Failing to avail itself of this defect, it would have been too late after verdict, as every reasonable intendment would be made to support it. And such an intendment will apply with equal or greater force to support an award. *Nor. Cent. Railway Co. vs. Canton Co. of Baltimore*, 499.

2nd. That there is no want of identity between the land claimed in the nar and that set out in the award. *Id.*, 499.

3rd. That the land is sufficiently described in the award. *Id.*, 499.

ENDORSER, ENDORSEE.

See BILLS OF EXCHANGE, &c., 2 to 9.

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EQUITY JURISDICTION.
See JURISDICTION IN EQUITY.
EQUITY PLEADING.
See PLEADING IN EQUITY.
EQUITY PRACTICE.
See PRACTICE IN EQUITY.
EQUITY PROCEEDINGS.
1. DEBT OF CORPORATION, BILL TO RECOVER FROM STOCKHOLDERS UNDER ACT OF 1852, CH. 338, SEC. 9. *Matthews et al. vs. Albert et al.*, 527.
2. DEED OF COMPOSITION WITH CREDITORS, BILL TO CONSTRUE. *Murray et al. vs. Spencer*, 520.
3. FORECLOSURE OF MORTGAGE, BILLS FOR. *Black vs. Carroll*, 251. *Franz vs. Teutonia Building Association*, 259. *Brooks, Trustee vs. Hays*, 507.
4. FRAUDULENT DEED, BILL TO SET ASIDE. *McDowell et al. vs. Goldsmith*, 214.
5. INJUNCTION, BILLS FOR. *Turner vs. Knell*, 55. *Tartar et al. vs. Gibbs et al.*, 323. *Hurtt vs. Woodland et al.*, 417. *Waters' Exec'x. vs. Waters' Trustee et al.*, 430. *Davidson vs. Myers et al.*, 588.
6. PETITION FOR AN ORDER REQUIRING RECEIVER TO BRING MONEY INTO COURT. *Henry et al. vs. Kauffman*, 1.
7. RELEASE BY CREDITORS OBTAINED BY FRAUD, BILL TO SET ASIDE.
8. RELEASE OF MORTGAGE, &C., BILL FOR. *Banks vs. McClellan*, 62.
9. SPECIFIC PERFORMANCE OF CONTRACT. *Myers vs. Forbes*, 598.
ESTOPPELS.
See MORTGAGE SALES IN BALTO. CITY, 7.
EVIDENCE.
1. NEGLIGENCE: PROVINCE OF COURT AND JURY.—In cases where the question of negligence is involved, a Court may, by proper legal inferences from the nature of the undertaking, determine in general the things required to be done in performing it, and the failure to do any of the things so required to be done would amount to negligence; but it has no such power when the question as to due diligence is made to depend on a state of facts and circumstances of a character so unusual that they could not have been contemplated by the parties to the undertaking, and to which no settled rule of law can be applied. *Merchants' Bank of Baltimore vs. Bank of Commerce use of Hoffman*, 53.
2. CONSTRUCTION OF THE WORDS "DOUBTFUL CREDIT": TRIAL OF FACTS.—The words "*Doubtful Credit*" are very comprehensive, and when used without words of limitation or qualification, are understood to mean reputation or standing in the community, as distinguished from the estimate of particular individuals; and in that sense the doubtful credit of a party, when found, is a fact of which persons presumptively have knowledge, without other proof of knowledge. *Id.*, 54.
3. PRACTICE IN EQUITY: BILL OF DISCOVERY: RESPONSIVE ALLEGATIONS

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EVIDENCE—*Continued.*

OF ANSWER.—The answer of a defendant to a bill of discovery, if responsive, is evidence for the defendant, unless overcome by the testimony of two witnesses, or one witness with corroborating circumstances. *Turner vs. Knell*, 60.

Where the bill called for a discovery as to the consideration for a note given to the defendant by the complainant, and alleged to have been for the accomodation of the defendant, and the latter stated in his answer that the note was discounted at bank by him, and detailed circumstances showing how the proceeds enured to the benefit of the complainant, HELD:

4. That all the matter stated referred to one transaction—the enuring of the proceeds of the discount to the use and benefit of the complainant, and was responsive as to the subject really in controversy between the parties. *Id.*, 60, 61.

5. RAIL ROAD COMPANIES, LIABILITIES OF: EVIDENCE, ADMISSIBILITY OF.—In an action against the Baltimore and Ohio Rail Road Company by the *prohein ami* of a child, run over and badly injured by the cars of the company, after evidence of the injury, and for the purpose of showing negligence on the part of the company, the plaintiff proposed to prove that it was the daily practice of the defendants to move their cars without a guard at the rear of the train over the "Y," which was so situated that the engineer at the engine could not see the rear; which evidence the Court below rejected. On appeal, HELD:

That the evidence was collateral and incapable of affording any reasonable presumption or influence as to the matters in issue, and was properly excluded. *Bannon vs. Baltimore & Ohio R. R. Co.*, 119.

6. GROSS NEGLIGENCE: PRAYERS AND INSTRUCTIONS TO THE JURY: DAMAGES, PUNITIVE AND EXEMPLARY.—The facts enumerated on p. 84, (being substantially the same proved in this case,) are not evidence of *gross negligence*, such as would warrant an instruction to the jury; that if they should find such negligence on the part of the agents of the Rail Road Company, they might allow punitive or exemplary damages. *Id.*, 124.

7. MEASURE OF DAMAGES, ELEMENTS OF.—In estimating damages under the evidence referred to, the jury should consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition in consequence of the said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those mechanical employments and pursuits for which, in the absence of the said injury, he would have been qualified; and also the physical and mental suffering to which he was subjected by reason of said injury; and such damages should be allowed as in the opinion of the jury would

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EVIDENCE—*Continued.*

be a fair and just compensation for such injury and suffering. *Id.*, 115, 125.

8. RAILROAD COMPANIES, LIABILITIES OF: DEGREE OF DILIGENCE ON PART OF DEFENDANT: NEGLIGENCE OF PLAINTIFF.—Rail Road Companies are bound in the management of their engines and trains to use such diligence and care as prudent and discreet persons would use and exercise on such occasions, with such motive power and trains, having due regard to the safety of property and persons; and if owing to the absence of such diligence and care a party is injured, he is entitled to recover for the injury, unless from his own negligence or want of reasonable care he has brought the same upon himself. *Id.*, 126.

9. PRACTICE.—Where a witness states that a party took possession of a vessel under a bill of sale, it is proper that the bill of sale should be produced. *Troxall et al. vs. Applegarth, Garnishees of Dunnock*, 181.

10. PRACTICE: EVIDENCE, ADMISSIBILITY OF IN PART WHEN OFFERED IN MASS.—When an offer is made of a mass of evidence complex in its character, and the whole of it is objected to, in such case if any part of it be admissible it is error to exclude the whole. The *onus* lies upon the objector to point out the inadmissible portions of the proof offered, and to take the instruction of the Court as to them. *Levy et al. vs. Taylor*, 294.

11. EVIDENCE, ADMISSIBILITY OF.—The introduction of an entire record as evidence of an adjudication between the same parties of the validity of a mortgage, with reference to the question of damages, is inadmissible, the validity, &c., of the mortgage not being involved in the issue in the cause. *Id.*, 294.

12. USAGE: MEANING OF THE TERM "BORROWED MONEY": ADMISSIBILITY OF PAROL EVIDENCE TO AID IN THE CONSTRUCTION OF DEEDS.—A deed of composition with creditors contained a provision for the payment of "all borrowed money and accomodation notes, and then all notes which were originally given in the course of business, and have been extended by the holders thereof," &c. On exceptions taken to the claim of a creditor allowed as if *borrowed money*, upon the ground that it was not "borrowed money" within the terms of this deed, HELD:

1st. That the words "all borrowed money," include, in ordinary popular sense, all sums of money loaned by a creditor to a debtor, without regard to the mode, or the existence of any security or evidence of indebtedness. And there being nothing in the context to limit the meaning of the words, it was incumbent on the exceptant to establish by clear, satisfactory proof, that the terms used have acquired and were used in a technical or peculiar sense. *Murray et al. vs. Spencer*, 524.

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EVIDENCE—*Continued.*

2nd. An usage to be admissible must be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform. *Id.*, 524, 525.

3rd. These principles apply as well to the admission of parol proof by the Court in aid of the interpretation of a deed, as to the admission of such proof when offered to establish the meaning of a contract, to be submitted under the directions of the Court to a Jury. *Id.*, 525.

4th. Where a debtor executes a deed of composition with his creditors, the discussion among the creditors, and their impressions about the claim of one of the creditors, before accepting the deed, and afterwards cannot be allowed to control its interpretation and construction, in the absence of all charges of fraud in procuring the composition. *Id.*, 526.

See ATTACHMENT, 1—1ST, 2ND, 3RD.
BILLS OF EXCHANGE, &C., ——.
PRINCIPAL AND AGENT, 4.
RAIL ROAD COMPANIES, &C., 1——4TH, AND 8—1ST.
WILLS, 1.
WITNESS, COMPETENCY OF, 1.

EXECUTION, STAY OF.

See APPEALS, 4, 5, 6, 7.
EXPERTS, EVIDENCE OF.
PRINCIPAL AND AGENT, 4.

FACTOR.

See MORTGAGE, &C., 8.

FRAUD.

See AGREEMENT, 1, 2.
ATTACHMENT, 1—1st to 4th.
CONTRACT, CONSTRUCTION OF, 2.

FRAUDULENT CONVEYANCE.

See ATTACHMENT, 1—1st to 4th.

FRAUDS, STATUTE OF.

See AGREEMENT, 1, 2.
ATTACHMENT, 1—1st to 4th.

FRAUDULENT SETTLEMENT WITH CREDITORS.

1. DEBTOR AND CREDITOR: COMPROMISE WITH CREDITORS PROCURED THROUGH FRAUD.—Where a debtor, having assets sufficient to pay all his debts, makes a false and fraudulent misstatement of his assets to his creditors, and thereby procures a settlement with them, by which they agree to accept his notes for fifty cents in the dollar on their claims, and surrender the original notes and execute a release of all

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FRAUDULENT SETTLEMENT WITH CREDITORS—*Continued.*

their claims on his paying the compromise notes—a Court of Equity on proof of the fraud, will set aside the settlement, and apply the property withheld from his creditors to the payment of the balance of their claims. *Jackson et al. vs. Hodges et al.*, 490, 491.

2 ——: THE STATUTE OF LIMITATIONS will not begin to run in such a case until the fraud has been discovered or becomes known to the complainants. *Id.*, 491,

GUARDIAN AND WARD.

See GUARDIAN'S BOND, ACTION ON.

GUARDIAN'S BOND, ACTION ON.

1. GUARDIAN AND WARD.—Where a guardian illegally sells and transfers the property of the ward contrary to the Act of Assembly, without a previous order of the Orphans' Court, and converts the proceeds to his own use, it is no answer to an action on the bond by the ward, that under the Act of Assembly the sale itself is void and passed no title to the purchasers. *State, use of Murray, vs. Murray et al.*, 302.

2. ——: ——: DAMAGES, MEASURE OF.—In such case it is clear that the action could be maintained, and if nothing else appeared the measure of Damages would be the value of the property illegally converted. *Id.*, 320.

3. ——: ——: CUMULATIVE REMEDY.—Where the property thus sold and transferred was the stock of an incorporated company, the ward is not confined to his action on the bond, but has the cumulative remedy against the corporation, may repudiate the sale as void and recover the stock thus illegally transferred. *Id.*, 320.

4. ——: ——: DAMAGES, MEASURE OF.—But where the ward has recovered from such incorporated company the value of the shares of stock illegally transferred by the guardian, in the action upon the guardian's bond, the measure of the damages is the loss actually suffered from the breach of the condition of the bond. *Id.*, 321.

5. And where the sale of the stock was held void under the Act of 1843, and it or its value has been actually restored by the corporation, though this fact does not defeat the action on the bond, it reduces the right of the plaintiff to the recovery of nominal damages only. *Id.*, 321.

6. THE ENTRY OF THE SUIT FOR THE USE OF THE CORPORATION, GIVES IT NO RIGHT OF ACTION ON THE GUARDIAN'S BOND.—Where, under the facts above stated, the suit is entered to the use of the corporation, and actually prosecuted for its benefit, after the restoration of the stock or its value, though entitled its action against the guardian to recover back the price paid him for the stock, it has no right of action on the guardian's bond. *Id.*, 322, 323.

HOMESTEAD OR BUILDING ASSOCIATIONS.

See MORTGAGE SALES IN BALTIMORE CITY, 6, 7, 8.

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HUSBAND AND WIFE.

See RAIL ROAD COS., &c., 8.

INDICTMENT.

See JUSTICES OF THE PEACE, 2.

INFANCY.

See RAIL ROAD COS., &c., 6.

INJUNCTION.

See APPEALS, 8.

LANDLORD AND TENANT, 4 to 7.

LEASE, &c., 1 to 4.

PLEADING IN EQUITY, 9.

PRACTICE IN EQUITY, 23.

INJUNCTION BOND, ACTION ON.

1. DISCHARGE OF SURETY.—The obligation of a defendant, surety in an injunction bond upon which suit is brought, is not discharged by the admission of other parties, as complainants, to prosecute the cause in which the injunction was issued—the bill for injunction being at the same time a creditor's bill. *Levy et al. vs. Taylor*, 290.

2. ——: ——: INJUNCTION BOND, CONSTRUCTON OF.—In construing such bond with reference to the question of the discharge of the obligation of the surety, the Court will be guided by the intention of the parties when the bond was executed, taking into consideration that the bill was filed by creditors in behalf of themselves and others who might come in, and that the bond was given in a judicial proceeding, as a necessary step to obtain the writ of injunction, and to indemnify the adverse party against its effects and operations. *Id.*, 291.

3. The condition of the bond was co-extensive with the objects and purposes of the bill, and the admission of new parties did not enlarge the responsibility of the obligors. The risk incurred by the surety when there was but one party complainant, was as great as when the number was increased. *Id.*, 291, 292.

4. MEASURE OF DAMAGES IN ACTION ON INJUNCTION BOND.—Where the injunction prayed by the bill was to prevent the defendants from selling, disposing of, or intermeddling with certain goods, and to obtain a decree applying the same to the payment of the debt of the complainants and others, the amount properly recoverable in an action on the injunction bond, is the loss in value of the goods during the operation of the injunction—not exceeding the penalty of the bond with interest thereon from the time of the institution of the suit. *Id.*, 291, 292.

INQUISITION.

ATTACHMENT.

See JUDGMENT.

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INSOLVENT LAWS.

EQUITY JURISDICTION: RECEIVER: A receiver in equity sold property of the defendant, by order of the Court, and while the proceeds of sale were in his hands, the defendant obtained the benefit of the Insolvent Laws, and the receiver was appointed his trustee in Insolvency. On appeal by the receiver and the defendant from an order of the Court of Equity, requiring him to bring the fund into Court, HELD:

1st. That the policy of the Insolvent Laws does not debar the Court in which the fund is found at the moment of Insolvency, from taking all steps necessary to its preservation. *Henry et al. vs. Kauffman*, 9.

2nd. That the order requiring the money to be brought into Court does not conflict with the power of the Insolvent Court, but is ancillary to it. Being brought in and the amount ascertained, an order to pay over to the insolvent trustee would follow as a matter of course. *Id.*, 9, 10.

3rd. That until the amount of his liability was determined, the receiver was not *functus officio*, and his appointment by the Insolvent Court did not discharge him from responsibility to the Court of Equity for the faithful discharge of his trust as receiver. *Id.*, 11.

4th. That the power of the Court of Equity in this instance, was ancillary to the jurisdiction of the Insolvent Court, and invoked for the protection of the fund which may be properly within the jurisdiction of the latter for distribution. *Id.*, 11.

INTEREST.

See USURY, 1 to 6.

JUDGMENT.

1. LIEN OF JUDGMENT: INTERLOCUTORY AND FINAL JUDGMENT.—A judgment by default was entered on the 15th of January, 1862, and final judgment for the amount of the claim with interest was entered up on the 30th of October, 1862, HELD:

1st. That this judgment could not in the nature of things relate back and take effect as of the date of the judgment by default; nor could the judgment by default, in establishing the jurisdiction of the Court and the simple fact of the plaintiffs right to recover, be said or understood to constitute a recovery. *Davidson vs. Myers, et al.*, 555.

2nd. That treating the judgment by default as interlocutory merely, it could not operate as a lien on the real or leasehold property of the defendant. *Id.*, 555.

2. The Act of 1861, Ch. 70, declares that judgments shall be liens *for their amount* and *from their date*, HELD:

That by this provision final judgments alone were contemplated. *Id.*, 556.

JUDGMENT, CONFESSION OF BY ADMINISTRATOR,

Cannot deprive the grantee of his intestate of the defence of limitations. *See* LIMITATIONS, 1, 2, 3.

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JUDGMENT, REVERSAL OF.

See BASTARDY, 4.

PRACTICE IN COURT OF APPEALS, 5.

JURISDICTION IN EQUITY.

1. RECEIVER: INSOLVENT LAWS.—A receiver in equity sold property of the defendant, by order of the Court, and while the proceeds of sale were in his hands, the defendant obtained the benefit of the Insolvent Laws, and the receiver was appointed his trustee in Insolvency. On appeal by the receiver and the defendant from an order of the Court of Equity, requiring him to bring the fund into Court, HELD:

1st. That the policy of the Insolvent Laws does not debar the Court in which the fund is found at the moment of Insolvency, from taking all steps necessary to its preservation. *Henry et al. vs. Kauffman*, 9.

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4th. That the power of the Court of Equity in this instance, was ancillary to the jurisdiction of the Insolvent Court, and invoked for the protection of the fund which may be properly within the jurisdiction of the latter for distribution. *Id.*, 11.

2. USURY.—Where property is mortgaged to secure a debt affected with usury, the assignee of the equity of redemption is entitled to the aid of a Court of Equity to redeem the property by paying the mortgage debt and simple interest thereon, or by bringing the same into Court to be paid, if a proffer to that effect is contained in the bill. *Banks vs. McClellan*, 79.

3. Where property subject to a mortgage, is sold clear of the mortgage, and certain certificates of stock, part of the purchase money, are deposited with a third party to await the determination of the amount due upon the mortgage, (the mortgagor claiming that the mortgage was in part usurious and should be reduced in amount,) and afterwards the vendor assigned his interest in the certificates, the assignee agreeing to pay the amount actually due on the mortgage so as to release the stock, HELD:

That the assignee may maintain a bill in equity against the mortgagee, to have the question of usury and the true amount of the mortgage debt determined. *Id.*, 79, 80.

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JURISDICTION—*Continued.*

4. ASSIGNMENT OF CHOSES IN ACTION.—The assignment also carried the rights of the assignor in and to certain real estate which he had conveyed absolutely to said mortgagee, but which conveyance by private understanding between him and said mortgagee was to be treated as a mortgage, and the latter in fraud of said agreement had sold the property to a third person, and the assignee of the stock sought to have this fraudulent sale accounted for so as to further reduce the amount due upon the stock, HELD:

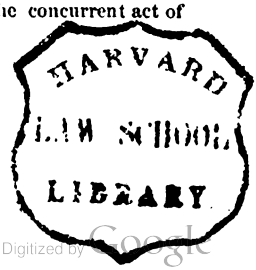
1st. That these matters of the assignment are not to be regarded as unmixed *choses in action* for the payment of money within the meaning of the Act of 1829, ch. 51. *Id.*, 80.

2nd. That as assignee of the mortgagor's rights in reference to the real estate, if the transaction in relation to it between the assignor and the defendant was intended merely as a security for a loan, the complainant can resort to a Court of Equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property upon payment of the amount properly due; or if the property has passed beyond her reach, and the mortgagee be overpaid, for a decree ordering an account and re-payment of the difference. *Id.*, 81.

JUSTICES OF THE PEACE.

1. APPOINTMENT AND REMOVAL OF OFFICERS: CONSTITUTIONAL LAW.—By the Constitution of 1864, Art. 2, sec. 16, it is provided that "All civil officers appointed by the Governor and Senate shall be nominated to the Senate within fifty days from the commencement of each *regular session* of the General Assembly; and their term of office, except in cases otherwise provided for in this Constitution, shall commence on the first Monday in May next ensuing their appointment, and continue for two years (unless sooner removed from office) and until their successors respectively qualify according to law." By Art. 12, sec. 6, it is provided that "All officers, civil and military, now holding office, whether by election or appointment, under the State, shall continue to hold and exercise their offices according to their present tenure unless otherwise provided in this Constitution, *until they shall be superseded according to its provisions*, and until their successors be duly qualified." By Art. 6, sec. 47, the term of office of Justice of the Peace was changed from an election by the people, to appointment by the Governor, by and with the advice and consent of the Senate, HELD:

That Justices of the Peace who were elected in November, 1863, and in office when the Constitution of 1864 was adopted, continue to hold their offices until there shall be regular appointments by the Governor and Senate superseding them; and that the concurrent act of



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JUSTICES OF THE PEACE—*Continued.*

the Senate could only be had at a *regular* and not a *special* session of the Legislature. *Taylor vs. Hebden*, 212, 213, 214.

2. INDICTMENT AT COMMON LAW OF JUSTICE OF THE PEACE FOR MALFEASANCE IN OFFICE: MISDEMEANOR: MOTION IN ARREST OF JUDGMENT.—A Justice of the Peace having discharged a prisoner brought before him, charged with the larceny of certain bank notes and promissory notes, and having refused to deliver the same, which he had taken from the prisoner when on examination, to one W. D., to whom the latter had assigned them, an indictment was found against him, charging that he, being then and there a Justice of the Peace, unlawfully, wilfully, oppressively, corruptly, and in violation and contempt of his duty as Justice of the Peace, neglected and refused to deliver the said bank notes and promissory notes to the said W. D., being then and there requested so to do, well knowing the said W. D. was entitled to receive the same, &c. The traverser having pleaded *not guilty*, after trial and verdict of *guilty*, moved an arrest of judgment, which being overruled he sued out a writ of error, HELD:

1st. That the plaintiff in error having been tried and found guilty of the facts as charged, whether by a jury or by the Court upon submission, those facts must be assumed to be true. *Hiss vs. The State*, 562.

2nd. That the facts charged constitute an offense amounting to a misdemeanor, for which the plaintiff in error was indictable and punishable at common law. *Id.*, 562.

LANDLORD AND TENANT.

1. CONTRACT, CONSTRUCTION OF: LEASE, SURRENDER OF.—J. F. W., executed on the 19th day of August, 1856, to J. W. P., a lease of his farm for four years from the 1st of January, 1857, reserving as rent one-half of all the grain raised on the farm, deducting seed wheat; also, one-half of the potatoes, if more than five bushels are planted; also one-half of the apples each year; and the tenant bound himself to sow one field in clover each year during the term. In the spring of 1857, J. F. W., planted one field of twenty-five acres in peach trees, which in 1857 and 1858 was cultivated in corn. This field becoming yearly less productive from the growth of the trees, in January, 1859, the said J. F. W. agreed to lease the same to the said J. W. P. for one year, the latter agreeing to furnish for said field two tons of Peruvian guano, and to work the same faithfully, in consideration whereof the former agreed that the latter should take therefrom eight hundred bushels of corn. The latter having assigned his interest in said lease and crop for the year 1859 to J. W. H., who received therefrom eight hundred bushels of corn, and also gathered and sold therefrom a crop of peaches, and received the money there-

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LANDLORD AND TENANT—*Continued.*

for. J. F. W. having in the meantime died, his heirs-at-law brought suit against J. W. H. to recover the value of the peach crop, HELD:

1st. That the relation of landlord and tenant as to the peach orchard field continued, notwithstanding the subsequent agreement. That under the stipulations and reservations of said lease, the tenant was entitled to the crop of peaches, and that his right thereto was in no way impaired by the subsequent agreement. *Hurtt vs. Woodland*, 415, 416, 417.

2nd. That the execution of the agreement cannot be considered a surrender of the lease. *Id.*, 417.

2. PRAYERS AND INSTRUCTIONS BY THE COURT: FRAUD.—The defendant's prayer in said action, after reciting the evidence in the cause, asked an instruction that the facts were proper for the jury to consider as "evidence tending to prove fraud" by J. F. W. on J W. P., HELD:

That the instruction was calculated to mislead the jury, who might have well supposed that the Court was instructing them as to the *sufficiency in fact* of the evidence to prove the alleged fraud. *Id.*, 417.

3. FARMING LEASE AND LEASE IN GENERAL TERMS: RIGHTS AND POWERS OF LESSEE: REMOVAL OF MANURE FROM PREMISES: IRREPARABLE DAMAGE.—It is settled by the general current of American as well as English authorities, that a tenant under a farming lease or contract has no right to remove from the premises so occupied, without an express stipulation to that effect, any manure made in whole or in part from the produce of the land. *Gallagher et al. vs. Shipley*, 427.

4. But where a lease is general in its terms and provisions, and says nothing as to the *purposes* for which the demised premises are to be used, or *how* they are to be used and occupied, the lessee is clothed with full power and right to occupy and use them for any lawful purpose not injurious to the reversion. *Id.*, 428.

5. Under such a lease there is no substantial ground for disputing the right of the lessee to the manure, accumulated by feeding cattle upon the land from provender brought upon the premises from other sources; nor of contesting, as likely to result in irreparable injury to the land, his right of removing the same so far as it is not commingled with the soil, provided that in removing the same he uses such diligence and skill as will prevent injury to the land. *Id.*, 429, 430.

6. VERBAL AGREEMENT BETWEEN PARTIES TO LEASE, ITS EFFECT UPON THE RIGHTS OF SUB-TENANT WITHOUT NOTICE.—Whatever may be the case as between the immediate parties to a lease, no mere verbal understanding between them can affect the rights of persons holding under the lessee without notice of it. *Id.*, 428.

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LEASE, LESSOR, LESSEE.

1. LANDLORD AND TENANT: FARMING LEASE AND LEASE IN GENERAL TERMS: RIGHTS AND POWERS OF LESSEE: REMOVAL OF MANURE FROM PREMISES: IRREPARABLE DAMAGE.—It is settled by the general current of American as well as English authorities, that a tenant under a farming lease or contract has no right to remove from the premises so occupied, without an express stipulation to that effect, any manure made in whole or in part from the produce of the land. *Gallagher et al. vs. Shipley*, 427.

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See CONTRACT, SPECIFIC PERFORMANCE OF, 1.

LEASE, SURRENDER OF.

See LANDLORD AND TENANT, 1.

LEGACIES AND BEQUESTS—CONTINGENT AND VESTED.

WILLS, CONSTRUCTION OF.—A testator provided by means of a trust for the annual support of his widow during her life, and also during the life of his said widow for the support of his daughter M., and the support, maintenance and education of his minor children, out of the rents, dividends, income and profits of his estate, real and personal, which he devised to two of his sons and their heirs, &c., upon the trusts and for the uses and purposes limited in the will; and the surplus of said rents, &c., he devised "in trust that the whole of said surplus be divided annually amongst all my children who may be of the age of twenty-one years, or who may be married," &c. The will was made in 1857; the testator died in 1858, leaving a widow and eight children, of whom two were under the age of twenty-one years when the will was executed; one of these became of age before the death of the testator, the other some time after.

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LEGACIES AND BEQUESTS--*Continued.*

Four were married when the will was executed. In 1859 one of the sons died, leaving a widow and children; another, one of the trustees, A. G. W., died in 1863, leaving also a widow and children. The said widow of the deceased trustee, having been appointed his executrix, and having qualified as such, filed a bill for an injunction to prevent such a distribution of the surplus rents, &c., in the hands of the surviving trustee as would exclude the estate of her husband from a participation therein, HELD:

That the children of the testator who were of the age of twenty-one years, or married, at the time of his death, took vested interests in their shares of the surplus income from his estates from that time; and that the shares of those who attained twenty-one years, or married after his death, became vested at the happening of either of those events, and that the share of A. G. W. survived to his personal representatives. *Waters Executrix vs. Waters Trustee*, 446, 447.

LIEN.

See JUDGMENT, 1 and 2.

PARTNERSHIP, &c., 1.

LIMITATIONS.

1. JUDGMENT—CONFESSION OF BY ADMINISTRATOR CANNOT DEPRIVE THE GRANTEE OF HIS INTESTATE OF THE DEFENCE OF LIMITATIONS.—In August, 1845, the creditors of O, grantor in a conveyance of real estate, filed a bill to set aside said deed as fraudulent. G, the defendant and grantee in said deed, pleaded the statute of limitations, and the cause being heard on bill and exhibits, answer and testimony taken, a final decree was passed dismissing the bill as to certain of the complainants and other creditors who had come in by petition, which decree upon their appeal was affirmed and the cause remanded. The final decree having directed the sale of the real estate for the payment of other claims thereby allowed, upon its affirmance, the trustees therein named proceeded to advertise the property for sale, giving the usual notice to creditors, under which certain of said complainants and creditors having obtained judgments by confession against the administrator of O, again filed their claims. New claims were also filed under said notice, to all of which the defence of limitations was taken by G, by way of exceptions to the auditor's reports and accounts. HELD:

That the defendant having been held by the Chancellor and Court of Appeals entitled to the defence of limitations to the claims of the creditors assailing the deed, the administrator of O could not deprive him of that defence by any admissions or acts whatever. *McDowell vs. Goldsmith*, 231.

2. ——: PRACTICE IN EQUITY.—The final decree of the Chancellor "reserved for further directions," all questions in regard to the claim

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LIMITATIONS—*Continued.*

of one of the complainants, T, on a note made in 1844 for $2,800. It subsequently appeared that said note was for a debt contracted after the execution of the deed, and did not mature until October, 1845, after letters were granted, (August 27th, 1845,) and two months after the said bill was filed, and was not filed as a claim in the cause until December, 1850. The administrator of O had also confessed a judgment in favor of this claimant. HELD:

1st. That the claim of T was barred by the defence of limitations, relied on in the answer of G to the bill of complaint, it appearing that limitations began to run in 1845, a period of more than three years before the claim was presented or asserted by any proceeding in the cause. *Id.*, 231.

2nd. That T had the right at the maturity of the note, if not before, to become a party to the said suit with respect to it; but to bring it within the equity of the bill already filed, it was necessary to present the note and assert it as a claim in the cause. *Id.*, 231.

3rd. That the confession of the judgment by the administrator does not affect the nature of the claim. *Id.*, 232.

3. PRACTICE IN EQUITY: EXCEPTION PRESENTING SUBSTANTIALLY THE DEFENCE OF LIMITATIONS SUFFICIENT.—Where an exception to claims filed under a notice to creditors presents in substance the defence of limitations, it will be held sufficient: the substance of the objection or defence must govern in determining its sufficiency rather than the form in which the objection or defence is presented. *Id.*, 233.

See CORPORATIONS, 3.
DEBTOR AND CREDITOR, 1.
FRAUDULENT SETTLEMENT, &c., 1.

MALFEASANCE IN OFFICE.

See JUSTICES OF THE PEACE, 2.

MANDAMUS.

See PLEADING IN EQUITY, 9.

MEASURE OF DAMAGES.

See DAMAGES, MEASURE OF.

MISDEMEANOR.

See JUSTICES OF THE PEACE, 2.

MISTAKE.

1. PAYMENT BY MISTAKE: NEGLIGENCE: BILLS OF EXCHANGE AND PROMISSORY NOTES.—H. & Co., of New York, drew a draft on L. & Co., of Baltimore, and sold it to a bank in New York, which sent it to its correspondent, a bank in Baltimore, for collection. By the negligence of the bank in Baltimore, the draft was not collected, and L. & Co., having failed in business, it was protested and returned to the bank in New York, which notified the fact of the dishonor to H.

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MISTAKE—*Continued.*

& Co., who, in ignorance of the fact of negligence, paid the amount of the draft. On a suit brought by the bank in New York for the use of H & Co., against the bank in Baltimore, HELD:

1st. That the payment by H. & Co. being made in mistake, conferred no benefit on the plaintiff, and could not operate for the advantage of the defendant, in the way of discharging or suspending its anterior liability to the plaintiff. *Merchants' Bank of Baltimore vs. Bank of Commerce use of Hoffman*, 52.

2nd. That as the amount of the draft was paid by H. & Co. under a mistake that entitled them to a return of the money, the plaintiff must be regarded as having received it for their use, and as holding it subject to their order. In legal contemplation the payment was a deposit, for which the plaintiff must account, and which, instead of suspending or discharging the defendant from its existing liability to the plaintiff, charges the plaintiff with one of an entirely different character to H. & Co. *Id.*, 52.

3rd. Nor was it essential to the plaintiff's right to recover, that the jury should find that the draft was returned to the defendant. The claim asserted here is not upon the draft, but one sounding in damages for the loss caused by the defendant's negligence and consequent failure to collect it. *Id.*, 52.

See PRACTICE IN EQUITY, 18.

MORTGAGE, MORTGAGOR, MORTGAGEE.

1. USURY: JURISDICTION IN EQUITY.—Where property is mortgaged to secure a debt affected with usury, the assignee of the equity of redemption is entitled to the aid of a Court of Equity to redeem the property by paying the mortgage debt and simple interest thereon, or by bringing the same into Court to be paid, if a proffer to that effect is contained in the bill. *Banks vs. McClellan*, 79.

2. Where property subject to a mortgage, is sold clear of the mortgage, and certain certificates of stock, part of the purchase money, are deposited with a third party to await the determination of the amount due upon the mortgage, (the mortgagor claiming that the mortgage was in part usurious and should be reduced in amount,) and afterwards the vendor assigned his interest in the certificates, the assignee agreeing to pay the amount actually due on the mortgage so as to release the stock, HELD:

That the assignee may maintain a bill in equity against the mortgagee, to have the question of usury and the true amount of the mortgage debt determined. *Id.*, 79, 80.

3. ASSIGNMENT OF CHOSES IN ACTION.—The assignment also carried the rights of the assignor in and to certain real estate which he had

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MORTGAGE, MORTGAGOR, MORTGAGEE—*Continued.*

conveyed absolutely to said mortgagee, but which conveyance by private understanding between him and said mortgagee, was to be treated as a mortgage, and the latter in fraud of said agreement, had sold the property to a third person, and the assignee of the stock sought to have this fraudulent sale accounted for, so as to further reduce the amount due upon the stock, HELD:

1st. That these matters of the assignment are not to be regarded as unmixed *choses in action* for the payment of money within the meaning of the Act of 1829, ch. 51. *Id.*, 80.

2nd. That as assignee of the mortgagor's rights in reference to the real estate, if the transaction in relation to it between the assignor and the defendant was intended merely as a security for a loan, the complainant can resort to a Court of Equity for a decree declaring the conveyance a mortgage, and directing the reconveyance of the property upon payment of the amount properly due; or if the property has passed beyond her reach, and the mortgagee be overpaid, for a decree ordering an account and repayment of the difference. *Id.*, 81.

4. USURY: COMPOUND INTEREST.—Money due for interest may, by agreement, be changed into principal to bear interest *in futuro*, but not otherwise. *Id.*, 82.

5. An agreement by the mortgagor to pay the taxes on the mortgage debt, is not usurious. *Id.*, 82.

6. An assignee standing in legal privity with the mortgagor may avoid the contract for the excess of usury, and is entitled to the proper reduction on the mortgage debt. *Id.*, 83.

7. EVIDENCE: COMPETENCY OF WITNESS.—A mortgagor who has assigned all his interest in the mortgaged property without recourse, may in a suit brought by the assignee be a witness to prove that the mortgage debt was affected with usury. *Id.*, 80.

8. REAL AND PERSONAL COVENANTS: COVENANT TO PAY MORTGAGE DEBT.—A borrowed money of B, to be expended in erecting houses upon certain land, and executed to B a mortgage of the land by which he covenanted for himself, his representatives *and assigns*, to pay the mortgage debt; and it was expressly declared in the mortgage that this, with certain other covenants, *should run with the land.* In an action upon this covenant to pay the mortgage debt, brought against an assignee of the mortgagor, HELD:

That the said covenant was not a covenant running with the land, and did not bind the assignee. *Glenn's Exc'rs vs. Canby*, 130, 131.

See MORTGAGE SALES IN BALTIMORE CITY, 1 to 11.

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MORTGAGE SALES IN BALTIMORE CITY.

1. CODE, VOL., 2., ART. 4, SEC. 782, RELATING TO MORTGAGE SALES IN BALTIMORE CITY: PROPRIETY OF DECREE AND VALIDITY OF SALE, WHEN TO BE CONTESTED: PRACTICE IN EQUITY.—The propriety of a decree and the validity of a sale made in pursuance thereof, in a proceeding under the Act of 1833, ch. 181, codified in vol. 2, Art. 4, and sec. 782 of the Code, may be inquired into and contested after the passage of the order of ratification *nisi*, and before the final order of confirmation is passed. *Black vs. Carroll*, 255.

2. The objection that under the Article and section of the Code referred to, a decree may not be entered as well after as before default is not supported, either by the words of the Code or by any decided case. *Id.*, 255.

3. The plain meaning of these provisions of the Code is, that where the decree is entered before default, no sale shall be made until something is due upon the mortgage; but they do not limit the remedy o the mortgagee to the period before the forfeiture. *Id.*, 256.

4. ——:——:——: THE ACT OF 1839, CH. 58, SEC. 3, conferred no new and enlarged power on the Court, nor gave any right to the mortgagee which was not given by the original Act of 1833, ch. 181 but must be taken as merely declaratory of the pre-existing law. *Id.*, 258, 257.

5. ——:——:——: ACT OF 1861, CH. 17.—The decree under which the sale in this case was made, was not suspended by the Act of 1861, ch. 17, but came within the exceptions of the 3rd section of that Act, which expressly excepts from the operation of the Act "decrees or judgments for the payment of interest or tax as between parties to mortgages, judgments or other contracts, upon which said interest or taxes are payable at a specified time or times. *Id.*, 258.

6. ACT OF 1833, CH. 181: RELATING TO MORTGAGES IN BALTIMORE CITY: DECREE. OBJECTIONS TO.—The objection to a decree passed in pursuance of the Act of 1833, ch. 181, and its supplements, that it was passed *after* default, and therefore improperly, was overruled in the preceding case. *Black vs. Carroll, ante p.* 251. *Franz vs. Teutonia Building Association*, 269, 270.

7. ——:——: ACT OF 1852, CH. 148: INCORPORATION OF HOMESTEAD OR BUILDING ASSOCIATIONS: ESTOPPELS.—The objection to such decree that it does not appear by averment or proof that the plaintiff was incorporated pursuant to the provisions of the Act of 1852, ch. 148, cannot be taken advantage of by a defendant who has recognized its existence and right to sue in accordance with the Act of 1852, by executing to it a mortgage. *Id.*, 270.

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MORTGAGE SALES IN BALTIMORE CITY.—*Continued.*

8. ——:——: Act of 1825, ch. 50: Certain Mortgages Excepted from its Operation.—The objection to said decree, that the mortgage upon which it was passed was void by the Act of 1825, ch. 50, because of the uncertainty as to the time for which it may exist, and of the amount to be paid under it, does not apply, it appearing to the satisfaction of the Court, from the mortgage itself, that the mortgagor was a member of the Association, and within the exception of the 7th sec. of the Act of 1852. *Id.*, 269, 270.

9. Foreclosure of Mortgage: Code, Vol. 2, Art. 4, Secs. 782, &c.—Where a mortgagor of realty in the city of Baltimore contains the assent of the mortgage to the passage of a decree for foreclosure, as authorized by the Code, Vol. 2, Art. 4, sec. 782, a decree passed *after default* is within the meaning and purview of the law. *Brooks, Trustee, vs. Hays*, 518.

10. A sworn statement of the amount due, filed by the mortgagee with his petition, after the forfeiture and before the time of sale, is in compliance with sec. 783 of the same Article of the Code. *Id.*, 518.

11. ——: ——: Trustees Bond: Practice in Equity.—The bond required by sec. 783 may be given by the trustee at any time before the sale. *Id.*, 518, 519.

NEGLIGENCE.

Evidence: Province of Court and Jury.—In cases where the question of negligence is involved, a Court may, by proper legal inferences from the nature of the undertaking, determine in general the things required to be done in performing it, and the failure to do any of the things so required to be done would amount to negligence; but it has no such power when the question as to due diligence is made to depend on a state of facts and circumstances of a character so unusual that they could not have been contemplated by the parties to the undertaking, and to which no settled rule of law can be applied. *Merchants' Bank of Baltimore vs. Bank of Commerce, use of Hoffman*, 53.

See Bills of Exchange, &c., 1, 2.
Evidence, 1.
Mistake, 1.
Rail Road Companies, &c., 1—1st to 4th, and 2, 3, 5, 6.

NEW PROMISE.

See Agreement, 2.

NOTICE.

Bills of Exchange, &c., 2 to 9.
Landlord and Tenant, 7.
Lease, &c., 4.

OFFICERS, APPOINTMENT AND REMOVAL OF.

See Justices of the Peace, 1.

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ORPHANS' COURT.

See PRACTICE IN ORPHANS' COURT.

PARENT AND CHILD.

See RAIL ROAD COS., 1.

PAROL AGREEMENT TO LEASE.

See LANDLORD AND TENANT, 7.

LEASE, 4.

PAROL EVIDENCE.

ADMISSIBILITY OF TO AID IN THE CONSTRUCTION OF DEEDS.

See EVIDENCE, 12.

PAROL PROMISE,

TO PAY THE PRE-EXISTING DEBT OF ANOTHER.

See AGREEMENT, 1, 2.

PARTNERSHIP—PARTNERS.

1. PRIORITY OF LIEN: DEED OF TRUST: ASSIGNMENT, ASSIGNOR, ASSIGNEE: AGREEMENT, CONSTRUCTION OF.—The firm of S. & H. having purchased of J. G. certain machinery in the "Valley Factory," on credit, gave their notes for the purchase money, to secure which, they executed on the 31st of March, 1851, a deed of trust to W. T. D., in which they agreed to insure the said property to the amount of the debts secured by the deed. The insurance was accordingly effected and all debts secured by the deed paid, except two notes to Giddings, one for $2,000 and the other for $1,124. On the 15th of January, 1852, M. A. D. became a member of the firm, thereafter styled S. H. & Co., with full knowledge of the deed of trust and recognizing its binding effect upon the new firm. On the 19th of November, 1852, the property was destroyed by fire. On the 20th of November, 1852, M. A. D., in the name of the firm, assigned the policies of insurance then in force to A. F. S. & W. R. S., to secure the payment of two notes, neither of which was then due, one for cotton purchased by the firm of S. H. & Co., from A. F. S. & W. R. S., and the other for a note endorsed by the latter for a commission and afterwards paid by them. On the 2nd of December S. & H. jointly assigned the money due on the policies to W. T. D., trustee as aforesaid, for the benefit of J. G., describing themselves as the acting partners of S. H. & Co. In an action of assumpsit by W. R. S. & A. F. S., against J. G., submitted on the above facts, HELD:

1st. That the agreement contained in the deed of trust to insure for the benefit of J. G. secured to him the proceeds of any insurance when effected, and when M. A. D. became a member of the firm with full knowledge of the agreement and obligation to insure for the benefit of J. G., any insurance effected by the new firm was equally affected by the lien of J. G., and M. A. D.

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PARTNERSHIP—PARTNERS—*Continued.*

could not divert it from this purpose. *Giddings vs. Seevers*, 375, 376.

2nd. That W. R. S. & H. F. S., as general creditors, trusted to the personal credit of the firm alone, J. G. relying also on the security of the insurance, and if the assignment of the insurance to them were sanctioned they would derive advantage from a fund to which they did not look, and J. G. would be deprived to that extent of that on which he specially relied. *Id.*, 376.

PLEADING.

See BASTARDY, 4.
EJECTMENT, 1.

PLEADINGS, AMENDMENT OF.

See ARBITRATION AND AWARD, 1.

PLEADING IN EQUITY.

1. PRACTICE IN EQUITY: BILL OF DISCOVERY: EVIDENCE: RESPONSIVE ALLEGATIONS OF ANSWER.—The answer of a defendant to a bill of discovery, if responsive, is evidence for the defendant, unless overcome by the testimony of two witnesses, or one witness with corroborating circumstances. *Turner vs. Knell*, 60.

Where the bill called for a discovery as to the consideration for a note given to the defendant by the complainant, and alleged to have been for the accommodation of the defendant, and the latter stated in his answer that the note was discounted at bank by him, and detailed circumstances showing how the proceeds enured to the benefit of the complainant, HELD:

2. That all the matter stated referred to one transaction—the enuring of the proceeds of the discount to the use and benefit of the complainant, and was responsive as to the subject really in controversy between the parties. *Id.*, 60, 61.

3. INCORPORATION OF CHRISTIAN SOCIETIES OR CONGREGATIONS UNDER ACT OF 1802, CH. 111: CORPORATIONS, HOW TO BE SUED.—Where a Christian society or congregation incorporates itself under the Act of 1802, ch. 111, the persons elected under the article of incorporation, constitute a body politic, and as such act as trustees, holding the estate in perpetual succession, and to manage the same in the most upright and careful manner, according to the discipline of the Church with which they are connected.

The corporation so formed can only be sued in its corporate name; and a suit against the trustees individually, designating them as trustees of the corporation, omitting part of the corporate name is not a suit against the corporate body, the designation superadded being merely a "*descriptio personæ.*" *Id.*, *Tartar et al., Trustees, vs. Gibbs et al.*, 335, 336.

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PLEADINGS IN EQUITY—*Continued.*

4. Where the legal capacities of persons are different, such capacities must be considered as if they were several persons. *Id.*, 337.
5. MULTIFARIOUSNESS: PRACTICE IN EQUITY.—A Court of Equity may *sua sponte* dismiss a bill for multifariousness when deemed necessary to the proper administration of justice. *Id.* 337.
6. The general rule is, that if the infirmity of the plaintiff's case appears upon the face of the bill, the defendant may rely upon it at the hearing, no matter how imperfect or what the character of the answer, and that it is only with respect to some defences given by statute, that a different rule prevails. *Id.*, 337, 338.
7. PRACTICE IN EQUITY.—An objection to the jurisdiction of the Court, or to the capacity of the plaintiffs, may be presented at any time. It may be made by demurrer, plea, answer, or taken advantage of at the hearing. *Id.*, 338.
8. INTRUSION: MANDAMUS: INJUNCTION.—If the trustees of a church have intruded upon the office or duties of the minister or stewards of the church, it is no ground for interposition by injunction at the instance of the male members of the congregation, but the remedy is by mandamus at the relation of the officer disturbed or ousted. *Id.*, 338, 339.

See LIMITATIONS, 1, 2, 3.
PRACTICE IN EQUITY, 1, 2.

POUNDAGE FEES.

1. As a general rule the defendant and not the plaintiff is liable for poundage fees. To enable the defendant to pay the costs they must be ascertained by the Sheriff and demanded, and a tender of the costs would be useless, if not impossible, in a case where the Sheriff, without demanding his costs persisted in selling under the execution. *Eakle et al. vs. Smith*, 362.

PRACTICE.

1. EVIDENCE.—Where a witness states that a party took possession of a vessel under a bill of sale, it is proper that the bill of sale should be produced. *Troxall et al. vs. Applegarth, Garn. of Dunnock*, 181.
2. ATTACHMENT ON WARRANT: MOTIONS TO STRIKE OUT JUDGMENT NISI AND TO QUASH ATTACHMENT: IGNORANCE OF GARNISHEES: FRAUD, DECEIT AND IRREGULARITY: ACCOUNT, WHEN TO BE FILED: RETURN OF SHERIFF AS TO AMOUNT LAID: INQUISITION UNNECESSARY.—In a case of attachment on warrant laid in the hands of S. F. & Co., the defendants being returned *non est*, and the garnishees having failed to appear, a judgment of condemnation *nisi* was entered against the latter. After judgment the garnishees appeared and moved that the same be stricken out and set aside "for fraud, deceit and surprise and irregularity in obtaining the same," and subsequently moved, "to quash the attachment because the accounts on which the defendants are alleged to be indebted to the plaintiffs, were not produced and filed

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PRACTICE—*Continued.*

with the affidavits made by the plaintiffs before the Justice who issued the warrant of attachment," HELD:

1st. That ignorance on the part of the garnishees of the necessity of appearing in Court and contesting the attachment affords no sufficient ground for striking out the judgment. *Freidenrich et al. Garn. vs Moore et al. use of Campbell*, 307.

2nd. That to justify the striking out of the judgment it would be necessary that clear and convincing proof should be given that the garnishees were prevented from making their defence by deceit practiced upon them by the plaintiffs, lulling them into the belief that the attachment had been or would be abandoned. *Id.*, 307, 308.

3rd. That it is immaterial whether the account which was produced was obnoxious to the objection urged against it by the garnishees or not, as the objection was not made in time. *Id.*, 308, 309.

4th. That the return of the Sheriff that he had laid the attachment in the hands of the garnishees, &c., without stating to what amount, is sufficient, the garnishees having been informed by the service of the writ what was the amount of the plaintiffs' account, *Id.*, 309.

5th. That it is not usual or necessary for the Sheriff to state in his return for what amount he has laid the attachment in the garnishees' hands, although that form has sometimes been observed. *Id.*, 309.

6th. That a failure of the garnishees to appear entitled the plaintiffs to the judgment *nisi*, which in such a case is a motion of course, and no inquisition is necessary. *Id.*, 309.

See BASTARDY, 4.

EVIDENCE, 10, 11.

GUARDIAN'S BOND, &c., 2 to 6.

INJUNCTION BOND, &c., 4.

POUNDAGE FEES, 1.

PRINCIPAL AND AGENT, 3, 4.

RAIL ROAD COS, &c., 1 to 6, & 2, 3, 4, 6, 8.

PRACTICE IN COURT OF APPEALS.

1. It is well settled that ordinarily no appeal will lie from an order requiring a trustee or receiver to bring money into Court. Such orders rest in the discretion of the Court, and where they determine no right, are not the subject of review on appeal. *Henry et al. vs Kauffman*, 11.

2. APPEAL AND ERROR: PRAYERS AND INSTRUCTIONS TO THE JURY.—This Court has repeatedly held that although there was error in the instruction of the Court below, such error will not be ground for re-

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PRACTICE IN COURT OF APPEALS—*Continued.*

versal if it appear that the party appealing was not injured thereby. *Staylor vs. Ball & Williams*, 201.

3. MOTION TO DISMISS.—Where an agreement to abandon an appeal for a legal and valuable consideration, executed on the part of the appellees, is fully proved to the satisfaction of the appellate Court and not denied by the appellant under oath or attempted to be disproved, there is no alternative but to dismiss the appeal. *Lester vs. Howard et al.*, 236.

4. The appellate Court alone has power to decide when an appeal will lie in any particular case. *Id.*, 236.

5. PRAYERS, &C.: A REVERSAL OF JUDGMENT NOT ALWAYS CONSEQUENT UPON THE REJECTION OF A CORRECT INSTRUCTION.—It has been repeatedly decided by this Court that a judgment will not be reversed on appeal, if it appears that the law of the case has been correctly laid down for the direction of the jury, or the appellant has not been prejudiced by the instruction actually given, notwithstanding the prayers rejected may have been correct in themselves. *Walker vs. Rogers, Exc'r of Rogers*, 237.

6. ORIGINAL JURISDICTION.—The Court of Appeals can only act upon exceptions to proof taken below, and it is not its province to decide upon the admissibility of evidence submitted to it primarily by agreement of counsel to be read subject to exceptions. Such action pertains to the Court of original jurisdiction, and the appellate Court can only review that action on appeal. *Levy et al. vs. Taylor*, 295.

See ARBITRATION AND AWARD, 1.

PRACTICE IN CRIMINAL CASES.

See JUSTICES OF THE PEACE, 2.

PRACTICE IN EQUITY.

1. BILL OF DISCOVERY: EVIDENCE: RESPONSIVE ALLEGATIONS OF ANSWER.—The answer of a defendant to a bill of discovery, if responsive, is evidence for the defendant, unless overcome by the testimony of two witnesses, or one witness with corroborating circumstances. *Turner vs. Knell*, 60.

2. Where the bill called for a discovery as to the consideration for a note given to the defendant by the complainant, and alleged to have been for the accommodation of the defendant, and the latter stated in his answer that the note was discounted at bank by him, and detailed circumstances showing how the proceeds enured to the benefit of the complainant, HELD:

That all the matter stated referred to one transaction—the enuring of the proceeds of the discount to the use and benefit of the complainant, and was responsive as to the subject really in controversy between the parties. *Id.*, 60, 61.

3. LIMITATIONS: JUDGMENT,—CONFESSION OF BY ADMINISTRATOR CANNOT DEPRIVE THE GRANTEE OF HIS INTESTATE OF THE DEFENCE OF LIM-

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PRACTICE IN EQUITY—*Continued*,

ITATIONS.—In August, 1845, the creditors of O, grantor in a conveyance of real estate, filed a bill to set aside said deed as fraudulent. G, the defendant and grantee in said deed, pleaded the state of limitations, and the cause being heard on bill and exhibits, answer and testimony taken, a final decree was passed dismissing the bill as to certain of the complainants and other creditors who had come in by petition, which decree upon their appeal was affirmed and the cause remanded. The final decree having directed the sale of the real estate for the payment of other claims thereby allowed, upon its affirmance, the trustees therein named proceeded to advertise the property for sale, giving the usual notice to creditors, under which certain of said complainants and creditors having obtained judgments by confession against the administrator of O, again filed their claims. New claims were also filed under said notice, to all of which the defence of limitations was taken by G, by way of exceptions to the auditor's reports and accounts. HELD:

That the defendant having been held by the Chancellor and Court of Appeals entitled to the defence of limitations to the claims of the creditors assailing the deed, the administrator of O could not deprive him of that defence by any admissions or acts whatever. *McDowell et al. vs. Goldsmith*, 231.

4. The final decree of the Chancellor "reserved for further directions," all questions in regard to the claim of one of the complainants, T, on a note made in 1844 for $2,800. It subsequently appeared that said note was for a debt contracted after the execution of the deed and did not mature until October, 1845, after letters were granted, (August 27th, 1845,) and two months after the said bill was filed, and was not filed as a claim in the cause until December, 1850. The administrator of O had also confessed a judgment in favor of this claimant. HELD:

1st. That the claim of T was barred by the defence of limitations, relied on in the answer of G to the bill of complaint, it appearing that limitations began to run in 1845, a period of more than three years before the claim was presented or asserted by any proceeding in the cause. *Id.*, 231.

2nd. That T had the right at the maturity of the note, if not before, to become a party to the said suit with respect to it; but to bring it within the equity of the bill already filed, it was necessary to present the note and assert it as a claim in the cause. *Id.*, 231.

3rd. That the confession of the judgment by the administrator does not affect the nature of the claim. *Id.*, 232.

5. EXCEPTIONS PRESENTING SUBSTANTIALLY THE DEFENCE OF LIMITATIONS

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PRACTICE IN EQUITY—*Continued.*

SUFFICIENT.—Where an exception to claims filed under a notice to creditors presents in substance the defence of limitations, it will be held sufficient; the substance of the objection or defence must govern in determining its sufficiency rather than the form in which the objection or defence is presented. *Id.*, 233.

6. CODE, VOL. 2, ART. 4, SEC. 782, RELATING TO MORTGAGE SALES IN BALTIMORE CITY: PROPRIETY OF DECREE AND VALIDITY OF SALE, WHEN TO BE CONTESTED: PRACTICE IN EQUITY.—The propriety of a decree and the validity of a sale made in pursuance thereof, in a proceeding under the Act of 1833, ch. 181, codified in vol. 2, Art. 4 and sec. 782 of the Code, may be inquired into and contested after the passage of the order of ratification *nisi*, and before the final order of confirmation is passed.—*Black vs. Carroll*, 255.

7. The objection that under the Article and section of the Code referred to, a decree may not be entered as well after as before default is not supported, either by the words of the Code or by any decided case. *Id.*, 255.

8. The plain meaning of these provisions of the Code is, that where the decree is entered before default, no sale shall be made till something is due upon the mortgage; but they do not limit the remedy of the mortgagee to the period before the forfeiture. *Id.*, 256.

9. ——: ——: ——: THE ACT OF 1839, CH. 58, SEC. 3, conferred no new and enlarged power on the Court, nor gave any right to the mortgagee which was not given by the original Act of 1833, ch. 181, but must be taken as merely declaratory of the pre-existing law. *Id.*, 256, 257.

10. ——: ——: ——: ACT OF 1861, CH. 17.—The decree under which the sale in this case was made, was not suspended by the Act of 1861, ch. 17, but came within the exceptions of the third section of that Act, which expressly excepts from the operation of the Act "decrees or judgments for the payment of interest or tax as between parties to mortgages, judgments or other contracts, upon which said interest or taxes are payable at a specified time or times." *Id.*, 258.

11. ACT OF 1833, CH. 181: RELATING TO MORTGAGES IN BALTIMORE CITY: DECREE: OBJECTIONS TO.—The objection to a decree passed in pursuance of the Act of 1833, ch. 181, and its supplements, that it was passed *after* default, and therefore improperly, was overruled in the preceding case, *Black vs Carroll, ante p.* 251. *Franz vs. Teutonia Building Association*, 269, 270.

12. ——: ——: ACT OF 1852, CH. 148: INCORPORATION OF HOMESTEAD OR BUILDING ASSOCIATIONS: ESTOPPELS.—The objection to such decree that it does not appear by averment or proof that the plaintiff was incorporated pursuant to the provisions of the Act of 1852, ch. 148, cannot be taken advantage of by a defendant who has recognized

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PRACTICE IN EQUITY—*Continued.*

its existence and right to sue in accordance with the Act of 1852, by executing to it a mortgage. *Id.*, 270.

13. ——: ——: ACT OF 1825, CH. 50, CERTAIN MORTGAGES EXCEPTED FROM ITS OPERATION.—The objection to said decree, that the mortgage upon which it was passed was void by the Act of 1825, ch. 50, because of the uncertainty as to the time for which it may exist, and of the amount to be paid under it, does not apply, it appearing to the satisfaction of the Court, from the mortgage itself, that the mortgagor was a member of the Association, and within the exception of the 7th section of the Act of 1852. *Id.*, 269, 270.

14. FORECLOSURE OF MORTGAGE: CODE, VOL. 2, ART. 4, SECS. 782, &c.—Where a mortgage of realty in the city of Baltimore contains the assent of the mortgagor to the passage of a decree for foreclosure, as authorized by the Code, Vol. 2, Art. 4, Sec. 782, a decree passed *after default* is within the meaning and purview of the law. *Brooks, Trustee, vs. Hays*, 518.

15. A sworn statement of the amount due, filed by the mortgagee with his petition, after the forfeiture and before the time of sale, is in compliance with sec. 783 of the same Article of the Code. *Id.*, 518.

16. ——: ——: TRUSTEE'S BOND: The bond required by section 783 may be given by the trustee at any time before the sale. *Id.*, 518, 519.

17. ——: ——: TRUSTEE'S SALE.—Where a trustee under a decree for foreclosure inadvertently described one of the lots advertised to be sold as subject to a ground rent of $65, instead of $65.50, the true amount, HELD:

That this furnished no adequate ground for interfering with the sale. *Id.*, 519.

18. MISTAKE: TRUSTEE'S SALE.—A mistake in the year in one of the advertisements of sale, not calculated to mislead—the advertisement of the same sale in another newspaper being without exception—is an irregularity which the Court may overlook in the ratification of the sale. *Id.*, 519.

19. MULTIFARIOUSNESS.—A Court of Equity may *sua sponte* dismiss a bill for multifariousness when deemed necessary to the proper administration of justice. *Tartar et al., Trustees, vs. Gibbs et al.*, 337.

20. PLEADINGS IN EQUITY.—The general rule is, that if the infirmity of the plaintiff's case appears upon the face of the bill, the defendant may rely upon it at the hearing, no matter how imperfect or what the character of the answer, and that it is only with respect to some defences given by statute, that a different rule prevails. *Id.*, 337, 338.

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PRACTICE IN EQUITY—*Continued.*

21. An objection to the jurisdiction of the Court, or to the capacity of the plaintiffs, may be presented at any time. It may be made by demurrer, plea, answer, or taken advantage of at the hearing. *Id.*, 338.

22. DIVINE WORSHIP: CHURCH MUSIC.—Singing is recognized as a part of Divine worship among almost all denominations of Christians. Whether it should or should not be accompanied with instrumental music, must be determined by those who administer the discipline of the Church to which they belong. *Id.*, 338.

23. INTRUSION: MANDAMUS: INJUNCTION.—If the trustees of a church have intruded upon the office or duties of the minister or stewards of the church, it is no ground for interposition by injunction at the instance of the male members of the congregation, but the remedy is by mandamus at the relation of the officer disturbed or ousted *Id.*, 338 and 339.

See CORPORATIONS, 1—1st to 6th.

PLEADING IN EQUITY, 1 to 9.

PRATICE IN ORPHANS' COURT.

See WILLS, 1.

PRAYERS AND INSTRUCTIONS TO THE JURY.

PRAYERS, &C.: A REVERSAL OF JUDGMENT NOT ALWAYS CONSEQUENT UPON THE REJECTION OF A CORRECT INSTRUCTION.—It has been repeatedly decided by this Court that a judgment will not be reversed on appeal, if it appears that the law of the case has been correctly laid down for the direction of the jury, or the appellant has not been prejudiced by the instruction actually given, notwithstanding the prayers rejected may have been correct in themselves. *Walker vs. Rogers, Exc'tx of Rogers*, 237.

PRAYERS, &C.: COMPENSATION OF AGENT FOR SERVICES RENDERED, RULE AS TO.—In an action to recover the value of services rendered, and the general issue pleaded, where no express contract is proved, and the nature of the employment is to be inferred from the acts of the parties, as where one is employed by and undertakes to aid and assist another in effecting a sale of property, an instruction offered by the defendant that the plaintiff could not recover unless the jury found that he did "diligently and faithfully occupy his time and render services in aiding R. to effect the sale," is sufficient. *Id.*, 248, 249.

An addition, however, to such prayer by the Court, requiring as essential to the recovery of the plaintiff that the jury should also find "that such services were of advantage and value to the employer in effecting said sale," does not vitiate the prayer, the propositions contained in the prayer and addition thereto being correlative, and in effect substantially the same. *Id.*, 249.

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PRAYERS AND INSTRUCTIONS TO THE JURY—*Continued.*

——: ——: MEASURE OF DAMAGES.—On the question of measure of damages for the services rendered, evidence having been given as to the rate of compensation usually paid in the city of Baltimore for such services, an instruction that the jury "may consider" such evidence in making up their verdict, is in proper form: an instruction that the jury "ought to consider" such evidence, &c., is too peremptory in its terms. *Id.*, 246, 250.

See LANDLORD AND TENANT, 2.
PRACTICE IN COURT OF APPEALS, 2.
RAIL ROAD COS., &c., 1—5th and 8.

PRESUMPTIONS.

See CORPORATIONS, 2—1st, 2nd and 9th.

PRINCIPAL AND AGENT.

1. PRAYERS, &c.: COMPENSATION OF AGENT FOR SERVICES RENDERED, RULE AS TO.—In an action to recover the value of services rendered, and the general issue pleaded, where no express contract is proved, and the nature of the employment is to be inferred from the acts of the parties, as—where one is employed by and undertakes to aid and assist another in effecting a sale of property, an instruction offered by the defendant that the plaintiff could not recover unless the jury found that he did "diligently and faithfully occupy his time and render services in aiding R. to effect the sale" is sufficient. *Walker vs. Rogers, Exc'r of Rogers*, 248, 249.

2. An addition, however, to such prayer by the Court, requiring as essential to the recovery of the plaintiff that the jury should also find "that such services were of advantage and value to the employer in effecting said sale," does not vitiate the prayer, the propositions contained in the prayer and the addition thereto being correlative, and in effect substantially the same. *Id.*, 249

3. ——: ——: MEASURE OF DAMAGES.—On the question of measure of damages for the services rendered, evidence having been given as to the rate of compensation usually paid in the City of Baltimore for such services, an instruction that the jury "may consider" such evidence in making up their verdict, is in proper form: an instruction that the jury "ought to consider" such evidence, &c., is too peremptory in its terms. *Id.*, 246, 250.

4. PRACTICE: WITNESS, EXAMINATION OF: EXPERTS, EVIDENCE OF.—Upon the same question, a witness, a property broker in the City of Baltimore, having been asked the question:—"What, in your opinion, as an expert, would be the value of such services, as proved by the evidence, the plaintiff has rendered the defendant's testator in the City of Baltimore in the year 1860?"—upon objection the question was held inadmissible. *Id.*, 243.

5. CONTRACT.—The law is well settled, that the principal is personally

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PRINCIPAL AND AGENT—*Continued.*

responsible in all cases of contracts made by an agent within the scope of his authority; and this is not varied by the fact that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit was given to the agent. *York Co. Bank of Pennsylvania vs. Stein et al.*, 463.

6. The circumstance, that the name of the principal was not disclosed at the time of the contract, does not determine the election of the plaintiff to look to the agent alone for the fulfillment of the contract. The principal is notwithstanding answerable when discovered. *Id.*, 463.

7. And such is the law with regard to a plaintiff principal who contracts by an agent. If the agent contracts in his own name without disclosing the principal, either the agent or the principal may sue upon the contract; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the principal as if the agent had been the contracting party. *Id.*, 464.

8. In all cases of contracts by agents without disclosing their principals, the Courts in affording remedies will look to the substantial parties in interest, in order to avoid circuity of actions; saving however to the defendant any rights which he may justly acquire as against the plaintiff by the course of dealing anterior to the disclosure, either with the agent of the plaintiff or his own agent. *Id.*, 464.

9. The principal will not be made personally liable if in the intermediate time he has settled with his agent without any suspicion of his own personal liability, or if he would otherwise, without any default on his own part be prejudiced by being made personally liable. *Id.*, 465.

10. In such cases it is essential that the plaintiff should in some way have either deceived the principal or induced him to alter his position and account towards his agent before he is deprived of his remedy against the principal. *Id.*, 465.

11. It is now settled that the simple fact that the principal has paid his agent the funds with which to pay the plaintiff, does not deprive the plaintiff of his right to look to the principal if the agent fail to pay over according to his orders. *Id.*, 465.

12. —— : ——: PROVINCE OF COURT AND JURY.—In an action at law where the question of agency is involved, if there is evidence to establish such agency, the jury are the exclusive judges of its weight. *Id.*, 466.

See CORPORATIONS, 2.
PARTNERSHIP &C., 1.
PRIORITY OF LIEN.
PROBATE OF WILLS.
WILLS, 1.

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PROCEDENDO.
See BASTARDY, 4.
PROMISOR AND PROMISEE.
See AGREEMENT, 1, 2.
PROTEST.
See BILLS OF EXCHANGE, &c.
PROVINCE OF COURT AND JURY.
See BILLS OF EXCHANGE, &c., 2, 9.
CONTRACT, CONSTRUCTION OF, 10.
EVIDENCE, 1.
PRINCIPAL AND AGENT, 12.
RAILROAD COMPANIES, LIABILITIES OF.
1. 1 CODE, ART. 65, SECS. 1 AND 2: EVIDENCE: PLAINTIFF MUST NOT HAVE CONTRIBUTED TO THE INJURY BY HIS OWN NEGLIGENCE: PRAYERS AND INSTRUCTIONS TO THE JURY: MEASURE OF DAMAGES: PARENT AND CHILD.

The Baltimore & Ohio Rail Road Company were the owners of a track on Locust Point, Baltimore, and used a locomotive for moving and arranging trains thereon. On the occasion in question, a train consisting of many cars was being backed by a locomotive at a slow speed around a curve, near which were houses which prevented the engineman from seeing the rear-most car upon which two boys had climbed and were riding, holding by the bumper, with their feet upon the brake-bar. A sudden jolt threw them upon the road, when the cars passed over them, killing one and maiming the other. The mother of the child thus killed, brought an action for damages against the Rail Road Company under Article 65, Sections 1 and 2 of the Code. It was in evidence that both boys had been driven from similar trains on former occasions, and complaint made to their parents. It was admitted that there was no employee of the company on the rear end of the hindmost car, or walking in advance of it, while moving backwards, and that the engineman and conductor knew nothing of the accident until some time after it had happened,

HELD:

1st. That the liability of the defendants in this case did not depend upon their obligations as carriers of passengers, in which character they are bound "to use the utmost care and diligence which human foresight can use," but their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect or default, "as would (if death had not occurred,) have entitled the party injured to maintain an action and recover damages in respect thereof." *State use of Coughlan vs. Baltimore & Ohio Rail Road Company*, 102.

2nd. That the party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the

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RAIL ROAD COMPANIES, LIABILITIES OF—*Continued.*

law requires toward those with whom there is a relation of trust and confidence, or bailment between the parties. *Id.*, 102, 103.

3rd. That if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although by the exercise of extraordinary care on their part the accident might have been prevented. *Id.*, 103.

4th. That in actions for injuries resulting in death, the plaintiff must show that neither the party injured, nor the parties for whose use the action was brought, had contributed by neglect or want of care to the calamity complained of. *Id.*, 105.

5th. That where an omission in an instruction given enures to the advantage of the appellant, advantage cannot be taken of the same on his appeal. *Id.*, 105.

6th. That the law entitles the mother to the services of her child during his minority only, (the father being dead,) beyond this the chances of survivorship, his ability or willingness to support her, and the mental suffering of the mother, resulting from the death of her child, are matters too vague to enter into an estimate of damages merely compensatory. *Id.*, 107.

2. EVIDENCE, ADMISSIBILITY OF.—In an action against the Baltimore and Ohio Rail Road Company by the *prohein ami* of a child, run over and badly injured by the cars of the company, after evidence of the injury, and for the purpose of showing negligence on the part of the company, the plaintiff proposed to prove that it was the daily practice of the defendants to move their cars without a guard at the rear of the train over the "Y," which was so situated that the engineer at the engine could not see the rear; which evidence the Court below rejected. On appeal, HELD:

That the evidence was collateral and incapable of affording any reasonable presumption or influence as to the matters in issue, and was properly excluded. *Bannon vs. Baltimore & Ohio R. R. Co.*, 119.

3. GROSS NEGLIGENCE: PRAYERS AND INSTRUCTIONS TO THE JURY: DAMAGES PUNITIVE AND EXEMPLARY.—The facts enumerated in note 1, on p. 664, (being substantially the same as here involved,) are not evidence of *gross negligence*, such as would warrant an instruction to the jury; that if they should find such negligence on the part of the agents of the Rail Road Company, they might allow punitive or exemplary damages. *Id.*, 124.

4. MEASURE OF DAMAGES, ELEMENTS OF.—In estimating damages under the evidence referred to, the jury should consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition in consequence of the said injury, and whether the said injury is in its nature permanent, and how far it is

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RAIL ROAD COMPANIES, LIABILITIES OF—*Continued.*

calculated to disable the plaintiff from engaging in those mechanical employments and pursuits for which, in the absence of the said injury, he would have been qualified; and also the physical and mental suffering to which he was subjected by reason of said injury; and such damages should be allowed as in the opinion of the jury would be a fair and just compensation for such injury and suffering. *Id.*, 115, 125.

5. DEGREE OF DILIGENCE ON PART OF DEFENDANT: NEGLIGENCE OF PLAINTIFF.—Rail Road Companies are bound in the management of their engines and trains to use such diligence and care as prudent and discreet persons would use and exercise on such occasions, with such motive power and trains, having due regard to the safety of property and persons; and if, owing to the absence of such diligence and care a party is injured, he is entitled to recover for the injury, unless from his own negligence or want of reasonable care he has brought the same upon himself. *Id.*, 126.

6. ——: ——: ——: THE INFANCY OF THE PLAINTIFF does not change either the degree of care or diligence to be used by the defendants in the management of their cars and engines, or enhance the measure of damages to be adopted by the jury. *Id.*, 125.

7. THE RULES REGULATING THE RIGHTS AND DUTIES OF PERSONS, NATURAL AND ARTIFICIAL, to each other, must be uniform; they cannot vary according to the years or degree of intellect of natural persons, without producing an uncertainty in the law destructive of all principle. *Id.*, 125.

8. In an action under the Act of 1852, ch. 299, by the wife for damages consequent upon the death of the husband, resulting from the carelessness of the defendant, a rail road company, evidence was given of the age, habits, health, and occupation of the deceased at the time of his death, and also of the number of his family and their condition before and after his death, but no evidence was offered of the specific wages paid the deceased at the time of his death, HELD:

1st. That a prayer—"That in the absence of proof, (other than the death, age and condition of health, and members and state of the family of said deceased,) of actual damage, the verdict of the jury, in the event of its being for the plaintiff, must be for nominal damages only"—was properly rejected. *Balto. & Ohio R. R. Co. vs. State use of Kelly et al.*, 280, 281, 282.

2nd. That in assessing the damages the jury should confine themselves to such compensation to the surviving members of Kelly's family as would supply to them the same results as would have followed from his labor during the probable period he would

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RAILROAD COMPANIES, LIABILITIES OF—*Continued.*

otherwise have lived and earned a livelihood; but that they might take into consideration his age, health and occupation, and the comfort and support afforded his family at the time of his death. *Id.*, 279.

RECEIPT.

See BASTARDY, 1, 2.

RECEIVER.

See JURISDICTION IN EQUITY, 1.

RECOGNIZANCE.

See BASTARDY, 1, 3.

RECOUPMENT.

See CORPORATIONS, 1.

RELEASE.

See WITNESS, COMPETENCY OF.

RELIGIOUS CORPORATIONS.

See CHRISTIAN SOCIETIES, &c., 1 to 6.

SALES.

See SHERIFF'S SALE.

SCIRE FACIAS.

See BASTARDY, 1, 4.

SHERIFF.

See POUNDAGE FEES, 1.
SHERIFF'S SALE, 1.

SHERIFF'S SALE.

1. SHERIFF'S SALE, WHO MAY OBJECT TO.—Where the defendant against whom a decree for the payment of money has been passed, subsequently sells his land, which is afterwards seized and sold under an execution upon the decree, the defendant as well as his vendee, while the execution proceedings are *in fieri*, has such an interest in the sale as will entitle him to the protection of the Court, if the sale was made without authority, or under such circumstances as necessarily involved a sacrifice. *Eakle et al. vs. Smith*, 362.

SPECIFIC PERFORMANCE.

See CONTRACT, SPECIFIC PERFORMANCE OF.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STAY OF EXECUTION.

See APPEALS, 4, 5, 6, 7.

SUPERSEDEAS.

See APPEALS, 4, 5, 6, 7.

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SURETY—DISCHARGE OF.

See INJUNCTION BOND, &c., 1.

TRUSTEE'S BOND.

See PRACTICE IN EQUITY, 16.

TRUSTEE'S SALE.

See PRACTICE IN EQUITY, 6, 8, 9, 10, and 14 to 18.

USAGE.

See EVIDENCE, 12.

USURY.

1. JURISDICTION IN EQUITY.—Where property is mortgaged to secure a debt affected with usury, the assignee of the equity of redemption is entitled to the aid of a Court of Equity to redeem the property by paying the mortgage debt and simple interest thereon, or by bringing the same into Court to be paid, if a proffer to that effect is contained in the bill. *Banks vs. McClellan*, 79.

2. Where property subject to a mortgage is sold clear of the mortgage, and certain certificates of stock, part of the purchase money, are deposited with a third party to await the determination of the amount due upon the mortgage, (the mortgagor claiming that the mortgage was in part usurious and should be reduced in amount,) and afterwards the vendor assigned his interest in the certificates, the assignee agreeing to pay the amount actually due on the mortgage so as to release the stock, HELD:

That the assignee may maintain a bill in equity against the mortgagee, to have the question of usury and the true amount of the mortgage debt determined. *Id.*, 79, 80.

3. COMPOUND INTEREST.—Money due for interest may, by agreement, be changed into principal to bear interest *in futuro*, but not otherwise. *Id.*, 82.

4. An agreement by the mortgagor to pay the taxes on the mortgage debt, is not usurious *Id.*, 82.

5. An assignee standing in legal privity with the mortgagor may avoid the contract for the excess of usury, and is entitled to the proper reduction on the mortgage debt. *Id.*, 83.

6. EVIDENCE: COMPETENCY OF WITNESS.—A mortgagor who has assigned all his interest in the mortgaged property without recourse, may in a suit brought by the assignee be a witness to prove that the mortgage debt was affected with usury. *Id.*, 80.

WAIVER.

See CORPORATIONS, 2—1st and 2nd.

NOTICE.

WILLS.

1. LAST WILL AND TESTAMENT, UNEXECUTED, WHEN NOT TO BE ADMITTED TO PROBATE.—E. M. having caused to be prepared in writing her

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WILLS—*Continued.*

last will and testament, declared herself fully satisfied therewith, but failed to execute the same, for nearly one year thereafter, when, desiring to execute it, but not being able to find it, she directed her brother Q. A. M. to have a second will prepared similar to the first. A second will was prepared, but E. M. died without having executed it. The second will having been offered for probate, a cayeat was fieled thereto the same day. It was proved by the attorney who prepared both of said wills that the second was in substance the same as the first; but it appeared that it was never in her possession; that she neither read it nor heard it read; that she made no inquiry in reference to it during her last illness, and there was no evidence to show that the deceased was unavoidably prevented from executing it, or that she intended it to have effect in its imperfect state. On appeal from an order of the Orphans' Court admitting the second will to probate, HELD:

That the state of the evidence leaves it in doubt whether the "*animus testandi*" manifested at one time by the deceased continued with her to the time of her decease, or during her testamentary capacity, after the preparation of the paper, and that the Orphans' Court was in error in admitting the proposed will to probate. *Morsell et al. vs. Ogden et al.*, 382.

2. WILLS, CONSTRUCTION OF: LEGACIES AND BEQUESTS, CONTINGENT AND VESTED.—A testator provided by means of a trust for the annual support of his widow during her life, and also during the life of his said widow for the support of his daughter M, and the support, maintenance and education of his minor children, out of the rents, dividends, income and profits of his estate, real and personal, which he devised to two of his sons and their heirs, &c., upon the trusts and for the uses and purposes limited in the will; and the surplus of said rents, &c., be devised "in trust that the whole of said surplus be divided annually amongst all my children who may be of the age of twenty-one years, or who may be married," &c. The will was made in 1857; the testator died in 1858, leaving a widow and eight children, of whom two were under the age of twenty-one years when the will was executed; one of these became of age before the death of the testator, the other some time after. Four were married when the will was executed. In 1859 one of the sons died, leaving a widow and children; another, one of the trustees, A. G. W., died in 1863, leaving also a widow and children. The said widow of the deceased trustee, having been appointed his executrix, and having qualified as such, filed a bill for an injunction to prevent such a distribution of the surplus rents, &c., in the hands of the surviving trustee as would exclude the estate of her husband from a participation therein, HELD:

That the children of the testator who were of the age of twenty-one

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WILLS—*Continued*.

years, or married, at the time of his death, took vested interests in their shares of the surplus income from his estates from that time; and that the shares of those who attained twenty-one years, or married after his death, became vested at the happening of either of those events, and that the share of A. G. W. survived to his personal representatives. ***Waters' Exct'x vs. Waters' Trustee***, 446, 447.

WITNESS, COMPETENCY OF.

1. EVIDENCE.—A mortgagor who has assigned all his interest in the mortgaged property without recourse, may in a suit brought by the assignee be a witness to prove that the mortgage debt was affected with usury. ***Banks vs. McClellan***, 80.

2. RELEASE.—A plaintiff in order to render a witness competent, during the trial executed a release to him, reserving "the right to proceed against any and all other parties who may in any manner be liable," HELD:

That such release rendered the witness competent, if he was before incompetent, without prejudice to the right of action of the plaintiff. ***Small vs. Shaefer***, 162.

WITNESS, EXAMINATION OF.

See PRINCIPAL AND AGENT, 4.

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